



UNIVERSITY OF CAPE TOWN

FACULTY OF LAW

The World Trade Organization (WTO) Appellate Body crisis: A critical analysis

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DHLPHU004

(22 888 words)

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Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the LLM in Commercial Law degree in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

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Declaration

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Phumelele Tracy Dhlamini

10 November 2020

Signed by candidate

Acknowledgements

I would like to thank God for providing me with wisdom and the ability to finish this degree.

I thank my supervisor, **Professor Faizel Ismail**, for the constructive feedback that he had provided to me from our first meeting up to the final draft. It was a great honour to have been supervised by him.

To the Director of the Centre for Comparative Law in Africa (CCLA) and my line manager, **Professor Ada Ordor**, thank you for your continued guidance and support over the last five years at UCT. Your contribution towards my academic and personal growth is deeply appreciated.

I would also like to thank my family for their love and prayers. I could not have done this without their support.

Dear **Phumelele**, congratulations for “**Mastering the law**”.

Dedication

I dedicate this research to my beloved mother, **Mrs Dumisile Sylvia Lukhele**. Thank you so much **LaMkhabela** for always being my biggest cheerleader.

Abbreviations

Anti-Dumping Agreement – Implementation of Article VI of the GATT 1994

CUTS International – Consumer Unity & Trust Society International

DDA – Doha Development Agenda

DSB – Dispute Settlement Body

DSU – Understanding on Rules and Procedures Governing the Settlement of Disputes (also referred to as the Dispute Settlement Understanding)

EU – European Union

FTAs – Free Trade Agreements

G20 – Group of 20

GATS – General Agreement on Trade in Services

GATT 1947 – General Agreement on Tariffs and Trade of 1947

ICC – International Criminal Court

ICJ – International Court of Justice

ICTSD – International Centre for Trade and Sustainable Development

KORUS FTA – United States-Korea Free Trade Agreement

MC – Ministerial Conference

MFN – Most-favoured-nation

MPIA – Multi-party Interim Appeal Arbitration Arrangement

NAFTA – North American Free Trade Agreement

NGO – Non-Governmental Organisation

OCED – Organisation for Economic Co-operation and Development

RTA – Regional Trade Agreement

SCM Agreement – Agreement on Subsidies and Countervailing Measures

S&DT – Special & Differential Treatment

SG Agreement – Agreement on Safeguards

SOEs – State Owned Enterprises

SPS Agreement – Sanitary and Phytosanitary Measures

SSA – sub-Saharan Africa

TBT – Technical Barriers to Trade

TFA – Trade Facilitation Agreement

TPP – Trans-Pacific Partnership

TRIPS – Trade-related Aspects of Intellectual Property Rights

UNCTAD – United Nations Conference on Trade and Development

US – United States

USDOC – United States Department of Commerce

USTR – United States Trade Representative

WB – World Bank

WTO – World Trade Organization

WTO Agreement – Marrakesh Agreement Establishing the World Trade Organization

WWII – World War II

Abstract

The World Trade Organization (WTO) dispute settlement system is facing unprecedented challenges, following the United States (US) decision to block the appointment of Appellate Body members. The US has justified its blocking tactic, already implemented since 2017 by raising several procedural and substantive concerns with the Appellate Body's failure to follow WTO rules. On 10 December 2019, the Appellate Body was however, forced to suspend its activities after the second terms of two of the remaining three members expired. While the WTO dispute settlement system continues to function at the panel stage, the Appellate Body is currently unable to review appeals because it lacks the minimum number of three members required to establish a division. In addition, any party to a dispute can block the adoption of a panel report by filing a notice to appeal which is likely to remain in limbo for an indefinite period. Numerous studies have discussed the Appellate Body crisis and its implications for the WTO dispute settlement system. Few, however, have critically analysed the validity of the concerns that the US has raised about the Appellate Body's work over the past few years. Therefore, the purpose of this research is to discuss and critically analyse these concerns to determine whether the Appellate Body had indeed strayed from its limited mandate. In addition, the research will provide recommendations on how to save the appellate stage and ensure that appeals are resolved while WTO members attempt to find permanent solutions to this unprecedented crisis.

Key words: Appellate Body, Dispute Settlement Body (DSB), Dispute settlement system, Dispute Settlement Understanding (DSU), and the World Trade Organization (WTO).

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Chapter 1: Introduction

1. Background

Until recently, the World Trade Organization (WTO) dispute settlement system was referred to as the 'jewel in the crown' of the organization.¹ Tirkey argues that unlike its predecessor the General Tariff on Trade Agreement of 1947 (GATT), the WTO dispute settlement system had been a great success during the first two decades of its existence.² In addition, it has been regarded as being one of the most widely used state-to-state dispute resolution mechanisms in the world.³ For example, since 1 January 1995, a total of 596 disputes have been brought to the WTO and over 350 rulings have been issued.⁴ This total number far exceeds that of other international tribunals such as the International Criminal Court (ICC) and the International Court of Justice (ICJ) which were founded in 2002 and 1945 respectively.⁵ Most importantly, Ambassador Xavier Carim also stated that the WTO dispute settlement system has enjoyed wide support among the member states who value it as an efficient and fair mechanism to resolve their trade disputes.⁶

Typically, a trade dispute arises when a member state has reasons to believe that the actions of another member state are contravening any of the covered agreements or their WTO obligations.⁷ The dispute settlement procedure at the WTO is formally initiated by a request for bilateral consultations between the member states concerned.⁸ The main purpose of holding consultations is for the parties concerned to try and resolve the dispute themselves before it reaches the litigation stage.⁹ Kristina pointed out that nearly half of all disputes in the WTO are usually settled at the consultations stage.¹⁰ However, if the consultations fail, the complaining party can request the Dispute Settlement Body (DSB) to establish an ad hoc panel

¹ Cosette Creamer 'From the WTO's crown jewel to its crown of thorns' (2019) 113 *AJIL Unbound* at 51.

² Aarshi Tirkey *The WTO Dispute Settlement System: An Analysis of India's Experience and Current Reform Proposals* (2019) at 9.

³ Jens Lehne *Crisis at the WTO: Is the Blocking of Appointments to the WTO Appellate Body by the United States Legally Justified?* (2019) Carl Grossmann Verlag at 1.

⁴ World Trade Organization *Dispute Settlement Activity: Some Figures*, available at https://www.wto.org/english/tratop_e/dispu_e/disputats_e.htm, accessed on 15 October 2019.

⁵ David Collins *The World Trade Organization: A Beginner's Guide* (2015) at 42.

⁶ WTO *WTO Dispute Settlement Body: Developments in 2016*, available at https://www.wto.org/english/tratop_e/dispu_e/carim318_e.htm, accessed on 14 March 2020.

⁷ Linimose Anyiwe & Eghosa Ekhatior 'Developing countries and the WTO dispute resolution system: A legal assessment and review' (2013) 2(1) *AJOL* at 124.

⁸ WTO *Understanding the WTO: Settling Disputes: A Unique Contribution*, available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/displ_e.htm, accessed on 3 October 2019.

⁹ *Ibid.*

¹⁰ Kristina Mitchell 'Developing country success in WTO disputes' (2013) 47 (1) *Journal of World Trade* at 78.

to assess the dispute.¹¹ If an appeal is filed, it will be heard by the Appellate Body,¹² whose members are appointed by the DSB through a consensus process.¹³ According to Smith, the Appellate Body is regarded as the highest adjudicative body in the WTO dispute settlement system and it has the final say in the review of all panel reports.¹⁴

However, all the activities of the Appellate Body are currently suspended because it does not have enough members to review appeals.¹⁵ In terms of art 17.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (also known as the Dispute Settlement Understanding, or DSU), a quorum of three Appellate Body members is required to establish a division to hear an appeal. On 10 December 2019, the term of office of Mr. Ujal Singh Bhatia and Mr. Thomas R. Graham, two of the three remaining members of the Appellate Body expired, leaving Ms. Hong Zhao, whose term ends on 30 November 2020.¹⁶ Discussions at several DSB meetings throughout 2019 to fill the six vacancies in the Appellate Body had proven fruitless,¹⁷ meanwhile, its docket continued to grow with complex pending appeals.¹⁸ Tirkey argues that by the end of 2019 there were 13 appeals pending,¹⁹ with no clarification from Geneva (the WTO's headquarters) as to how, when and by whom these would be decided.²⁰

¹¹ WTO *Dispute Settlement: Appellate Body*, available at https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm, accessed on 5 November 2019.

¹² Ibid.

¹³ James Bacchus & Simon Lester 'The rule of precedent and the role of the Appellate Body' (2020) 54(2) *Journal of World Trade* at 187.

¹⁴ James McCall Smith 'WTO dispute settlement: The politics of procedure in Appellate Body rulings' (2003) 2 (1) *World Trade Review* at 66.

¹⁵ WTO *Dispute Settlement: Members Urge Continued Engagement on Resolving Appellate Body Issues* available at https://www.wto.org/english/news_e/news19_e/dsb_18dec19_e.htm, accessed on 16 January 2020.

¹⁶ Baker McKenzie *Deadlock at the WTO Appellate Body: No Consensual Way out in Sight* (2019), available at <https://www.bakermckenzie.com/en/insight/publications/2019/12/deadlock-at-wto-appellate-body>, accessed on 15 January 2020.

¹⁷ WTO *Annual Report* (2020) at 119 available at https://www.wto.org/english/res_e/booksp_e/anrep_e/anrep20_chap6_e.pdf accessed on 25 June 2020.

¹⁸ Ujal Singh Bhatia *Launch of the WTO Appellate Body's Annual Report for 2018*, available at https://www.wto.org/english/tratop_e/dispu_e/ab_report_launch_e.htm, accessed on 12 January 2020.

¹⁹ WTO 'Dispute Settlement: Members reiterate joint call to launch selection process for Appellate Body members', available at https://www.wto.org/english/news_e/news19_e/dsb_22nov19_e.htm, accessed on 10 January 2020.

²⁰ Aarshi Tirkey *The WTO's Appellate Body Crisis: Implication for Trade Rules and Multilateralism* (2020), available at <https://www.orfonline.org/expert-speak/the-wtos-appellate-body-crisis-implication-for-trade-rules-and-multilateralism-60198/> accessed on 20 June 2020.

The Appellate Body crisis was instigated by the United States (US), one of the architect and most frequent user of the WTO dispute settlement system.²¹ Deepak argues that the US has been blocking the appointment of all members of the Appellate Body since 2017,²² due to several concerns over judicial activism on their part.²³ For example, the Appellate Body is said to have frequently (a) breached the strict timelines for completing appeals; (b) permitted former members of the Appellate Body to hear pending appeals; (c) reviewed the facts of panels and the municipal law of member states; (d) issued advisory opinions; (e) treated its reports as binding precedent; and (f) issued erroneous interpretations of the covered agreements.²⁴

Although the US has outlined the above mentioned concerns at the WTO General Council and various DSB meetings, they were however, summarised in detail in the ‘*2018 President’s Trade Policy Agenda*’,²⁵ and subsequently updated in the ‘*2020 Report on the Appellate Body of the World Trade Organization*’.²⁶ In these above-mentioned reports, it was highlighted that for many years, multiple US administrations had raised several concerns about the Appellate Body’s failure to respect basic WTO rules.²⁷ McDougall argued that these concerns were, however, elevated to new heights after the inauguration of the new US President, Donald Trump in January 2017.²⁸ He also added that the escalation by the Trump administration ‘reflects its scepticism about multilateralism in general and binding dispute settlement in particular, and its deep suspicion that global trade rules are increasingly stacked against US interests’.²⁹ At the Senate Finance Committee in 2019, the United States Trade Representative (USTR) Mr Robert Lighthizer announced that the US was using the process of appointing new

²¹ Amrita Bahri ‘Appellate body held hostage: Is judicial activism at fair trial?’ (2019) 53(2) *Journal of World Trade* at 294.

²² Garima Deepak ‘WTO dispute settlement: the road ahead’ (2019) 51 *International Law and Politics*, at 982.

²³ Robert E Lighthizer *Report on the Appellate Body of the World Trade Organization* (2020) at 25, available at https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf, accessed on 20 March 2020.

²⁴ Ibid 23 at 25–67.

²⁵ Robert E Lighthizer *US President’s Trade Policy Agenda* (2018), available at <https://ustr.gov/sites/default/files/Press/Reports/2018/AR/2018%20Annual%20Report%20I.pdf>, accessed on 20 November 2019.

²⁶ Op cit note 23 at 25–118.

²⁷ Ibid note 23 at 13.

²⁸ Robert McDougall *Crisis in the WTO: Restoring the WTO Dispute Settlement Function* (2018) at 1, available at <https://www.cigionline.org/publications/crisis-wto-restoring-dispute-settlement-function>, accessed on 22 May 2020.

²⁹ Ibid at 1.

members of the Appellate Body as the only leverage available to push for broader WTO reforms.³⁰

According to Tireky, some of the US's concerns with the Appellate Body's judicial functioning are widely shared by other WTO members,³¹ nevertheless they have criticised the country's blocking tactic as inappropriate.³² Bown and Keynes argues that in November 2018, these WTO members had submitted several reform proposals in an attempt to address the US's concerns.³³ For example, they called for the amendment of the DSU rules to (a) create mechanisms to ensure that appeal proceedings are finished within 90 days unless the parties decide otherwise; (b) create transitioning rules that specify which cases outgoing Appellate Body members are allowed to stay on to complete them; (c) clarify that the legal issues that are subject to review do not include the review of panel's factual findings and the municipal law of member states; (d) indicate that the review scope of the Appellate Body must only address the issues that were raised by the parties in a dispute; and (e) organise annual meetings between the DSB and the Appellate Body to discuss systemic issues or trends in the WTO jurisprudence.³⁴

These proposals were, however, rejected by the US on the grounds that the longstanding concerns it raised about the Appellate Body's functions were inadequately addressed.³⁵ At the 11th Ministerial Conference (MC11) in 2017, the USTR Mr Lighthizer told the other members that it was unnecessary to amend the DSU rules to permit what is clearly prohibited under the existing rules of the WTO.³⁶ Instead, the Appellate Body should just adhere to the provisions

³⁰ Rob Davies *The Politics of Trade in the Era of Hyperglobalisation: A Southern African Perspective* 2019 at 49, available at https://www.southcentre.int/wp-content/uploads/2019/11/Bk_2019_The-Politics-of-Trade-in-the-Era-of-Hyperglobalisation-A-Southern-African-Perspective_EN.pdf, accessed on 23 May 2020.

³¹ Tireky op cit note 2 at 6-7.

³² WTO *WTO Members Debate Appointment/Reappointment of Appellate Body Members* (2016), available at https://www.wto.org/english/news_e/news16_e/dsb_23may16_e.htm, accessed on 20 June 2020.

³³ Chad Bown & Soumaya Keynes *Why Trump Shot the Sheriffs: The End of WTO Dispute Settlement* (2020) at 18, available at <https://www.piie.com/publications/working-papers/why-trump-shot-sheriffs-end-wto-dispute-settlement-10>, accessed on 20 June 2020.

³⁴ European Commission 'WTO reform: EU proposes way forward on the functioning of the Appellate Body' Press Release, 26 November 2018, available at https://ec.europa.eu/commission/presscorner/detail/en/IP_18_6529, accessed on 5 November 2019.

³⁵ U.S. *Statements by the US at the WTO General Council meeting, December 12, 2018*, available at https://geneva.usmission.gov/wp-content/uploads/sites/290/Dec12.GC_.Stmt_.items_.7.and_.8.as_.delivered.clean_.pdf, accessed on 20 January 2020.

³⁶ Robert Lighthizer *Opening Plenary Statement of USTR Robert Lighthizer at the WTO Ministerial Conference, WT/MIN (17)/ST/128* (2017), available at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/december/opening-plenary-statement-ustr>, accessed on 12 January 2020.

of the DSU as agreed by the member states in 1995.³⁷ At the same time, the USTR Mr Lighthizer also asked the members of the WTO to first collectively acknowledge that the Appellate Body has strayed from its limited mandate and to understand why it felt free to do so.³⁸ In addition, he then proposed to the members of the WTO that a monitoring mechanism should be created within the dispute settlement system to ensure that the Appellate Body adheres to the written rules in the future.³⁹ It remains uncertain in Geneva, however, as to what can be done to satisfy the US, especially since it rejected all the calls to suggest solutions.⁴⁰

In January 2019, the General Council appointed New Zealand ambassador David Walker as a facilitator charged with assisting the member states to find solutions to address the US's concerns.⁴¹ A few months later, the '*Draft General Council Decision on the Functioning of the Appellate Body Report*' was presented by ambassador Walker to the members of the WTO in which he outlined several concessions on how to address the US's concerns.⁴² However, the report was heavily criticised by the US which argued that it failed to show that rest of the member states had reached a common understanding that the Appellate Body has contravened the basic rules of the WTO.⁴³ Lehne argues that after realising the severity of the appointment crisis in the Appellate Body, a group of WTO members began to explore interim measures to try and save the appellate stage while permanent solutions to the crisis were sought in Geneva.⁴⁴ Some of these interim measures include the (a) removal of the appellate review stage from the WTO dispute settlement system; (b) permitting the disputing parties to sign a 'no appeal agreement'; (c) appointing new members of the Appellate Body through voting; (d) agreeing to adopt a plurilateral dispute settlement agreement without the US; (e) resorting to alternative

³⁷ Ibid.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Lighthizer op cit note 23 at 121.

⁴¹ WTO General Council Chair Appoints Facilitator to Address Disagreement on Appellate Body, available at https://www.wto.org/english/news_e/news19_e/gc_18jan19_e.htm, accessed on 20 January 2020.

⁴² David Walker Informal Process on Matters Related to the Functioning of the Appellate Body, available at <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/Jobs/GC/222.pdf>, accessed on 20 February 2020.

⁴³ Dennis Shea Statements Delivered to the General Council by Ambassador Dennis Shea, U.S. Permanent Representative to the World Trade Organization 15 October 2019, available at <https://geneva.usmission.gov/2019/10/15/statements-by-the-united-states-at-the-wto-general-council-meeting> accessed 15 September 2020.

⁴⁴ Lehne op cit note 3 at 27.

dispute settlement mechanisms available in the DSU; and (f) resolving appeals by using the arbitration process in the DSU.⁴⁵

1.1 Problem statement and argument advanced in this research

According to art 17.2 of the DSU, all the members of the Appellate Body shall be appointed by the DSB to serve a four-year term with the possibility of being reappointed once. In addition, art 2.4 of the DSU provides that the DSB's decision to appoint members of the Appellate Body shall be made by consensus. Consensus in the WTO is presumed to have been reached 'if no Member, present at the meeting of the DSB when the decision is taken, formally objects to the proposed decision'.⁴⁶ Similarly, art 17.2 of the DSU requires that the vacancies in the Appellate Body should be filled by the DSB whenever it becomes necessary. However, the DSB has failed to fill the existing six vacancies in the Appellate Body because of the US's refusal to consent to the appointment process since 2017.⁴⁷ Lehne also adds that the reform proposals that have been submitted by several WTO members to overcome the crisis in the Appellate Body have also failed to persuade the US to cooperate.⁴⁸ Instead, the US has announced on numerous occasions that it will not lift the veto on the appointment of Appellate Body members unless its concerns have been adequately addressed by the member states.⁴⁹

While numerous studies have discussed the Appellate Body crisis and the implications it has for the WTO dispute settlement system. Few, however, have critically analysed the validity of the reasons provided by the US for blocking the appointment process in the Appellate Body. Similarly, most of the reform proposals that have been tabled in Geneva so far have failed to question whether the US's concerns are well founded.⁵⁰ Therefore, the purpose of this research is to critically analyse these concerns to determine if the Appellate Body has breached its limited mandate, as set out in the WTO rules. The research will demonstrate that many of the US's concerns could be argued to have some credibility and that they are widely shared by other WTO members. However, the approach taken by the US is not constructive and it fails to resolve the main source of the problem – being the failure of the WTO's negotiating function

⁴⁵ Clifford Chance *The WTO Appellate Body: A Way Forward?* (2019) at 6, available at <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2019/11/the-wto-appellate-body-crisis-a-way-forward.pdf>, accessed on 21 January 2020.

⁴⁶ WTO, Marrakesh Agreement Establishing the World Trade Organization 1994, Footnote 1.

⁴⁷ Deepak op cit note 22 at 982.

⁴⁸ Lehne, op cit note 3 at 26.

⁴⁹ Ibid at 2.

⁵⁰ Weihuan Zhou & Henry Gao 'Overreaching' or 'overreacting'? Reflections on the judicial function and approaches of WTO Appellate Body (2019) 53(6) *Journal of World Trade* at 2.

to complete the Doha Round of multilateral trade negotiations to update the rules to reflect the current state of the global economy. It is further held that besides the Trade Facilitation Agreement (TFA) which came into effect in 2017, the WTO's rulebook has not been updated since 1995.⁵¹ In addition, this research will provide recommendations to save the appellate review stage while permanent solutions to the crisis are sought by the member states.

1.2 Research question

The main research question is: *Why is the US vetoing the appointment of Appellate Body members and whether these longstanding concerns raised are valid?*

In engaging with the above research question, the following additional research questions are discussed:

- What is the Appellate Body?
- What is the history of the WTO dispute settlement system?
- What is the crisis in the Appellate Body and the potential implications it has for the WTO dispute settlement system?
- Why is the US vetoing the selection process of appointing members of the Appellate Body?
- Whether these longstanding concerns raised by the US are valid?
- What are the reform proposals that have been submitted by the member states and whether they are practical?
- How can the Appellate Body impasse be bypassed while permanent solutions are sought by the members states?

1.3 Research objectives

The primary objectives of this research are to explain: *Why is the US vetoing the appointment of Appellate Body members and whether these longstanding concerns raised are valid?*

Specific research objectives are to:

- Define the Appellate Body.

⁵¹ James Nedumpara & Prakhar Bhardwaj *The Crisis in the WTO Appellate Body: Implications for India and the Multilateral Trading System* (2019) at 3, available at <https://ctil.org.in/cms/docs/Papers/Discussion/discussion6.pdf>, accessed on 22 June 2020.

- Trace the historical development of the WTO dispute settlement system.
- Discuss the crisis in the Appellate Body and its implications for the WTO dispute settlement system.
- Explain why the US is vetoing the selection process of appointing members of the Appellate Body.
- Critically analyse whether these longstanding concerns raised by the US are valid.
- Discuss the reform proposals that have been submitted by the member states and explain whether they are practical.
- Propose recommendations on how the Appellate Body impasse could be bypassed until permanent solutions are sought by the member states.

1.4 Importance of and justifications for the research

This research is significant because the collapse of the Appellate Body does not mean that the WTO dispute settlement system has entirely broken down.⁵² Instead, ad hoc panels continue to assess trade disputes and the member states rights to appeal panel reports are still intact. However, this means that any party in the dispute can block the dispute settlement process by filing an appeal which will be left in limbo for an indefinite period. The notice of appeal that was filed by the US in December 2019 against a panel ruling that had found that the tariffs it imposed on Indian steel products were inconsistent with WTO agreements, illustrates how a member state can leverage the Appellate Body crisis in its favour.⁵³ In addition, art 16.4 of the DSU provides that appealed panel reports shall not be considered for adoption by the DSB unless they have been concluded by the members of the Appellate Body.⁵⁴ This means that the country which won the dispute at the panel stage cannot claim the value of its winnings while the appeal remains unresolved. In practical terms, however, Hillman argues that there is no country in the WTO that is likely to wait for the appeal to be finalised while knowing that there

⁵² Anabel González & Euijin Jung 'Developing countries can help restore the WTO's dispute settlement system' (2020) PB20-1 *Peterson Institute for International Economics Policy Brief* at 1.

⁵³ WTO 'Dispute settlement: United States notifies decision to appeal compliance panel ruling in steel dispute with India' (2020) *WTO News*, available at https://www.wto.org/english/news_e/news20_e/ds436oth_17jan20_e.htm, accessed on 20 January 2020.

⁵⁴ Geraldo Vidigal 'Living without the Appellate Body: Multilateral, bilateral and plurilateral solutions to the WTO dispute settlement crisis' (2019) 20 *Journal of World Investment & Trade* at 870.

is no Appellate Body division to hear that appeal.⁵⁵ In fact, most countries will disregard the rules of the WTO and impose retaliatory measures to protect their trade interests.⁵⁶

The WTO's credibility as a reputable organization for multilateral trade is derived from its ability to enforce the commitments that the member states had agreed to.⁵⁷ However, in the absence of a reliable enforcement mechanism in the WTO, it is believed that the member states would be reluctant to negotiate new rules if existing ones cannot be enforced due to the imminent blocking of panel rulings.⁵⁸ Schott and Jung also claims that the US is risking both the ongoing and prospective trade negotiations in the WTO on new rules for issues such as fisheries, digital trade, subsidies and others which are important for the US economy to flourish.⁵⁹ In addition, the US's actions are deemed to be undermining its ability to use the WTO dispute settlement system to defend its rights and trade interests against inconsistent trading practices of non-market economies members such as China.⁶⁰

The legalisation of the WTO dispute settlement system at the end of the Uruguay Round negotiations was intended to provide a fair dispute resolution system to which all the member states would have access to, regardless of their political or economic status.⁶¹ Scholars such as Ismail argue however, that the collapse of the Appellate Body will adversely harm the economic prospects of many developing countries, particularly those who lack the economic power to either enforce their rights or to protect their trade interests.⁶² Even though existing data shows that the participation of most developing countries in the system remains very low, however, over 80 per cent of all disputes in the WTO have involved either one high-income country or one low-income country.⁶³ Amaral Jr, de Oliveira Sá Pires and Lucena Carneiro also contend that 'developing countries rely on the findings and recommendations of the

⁵⁵ Jennifer Hillman 'Three approaches to fixing the World Trade Organization's Appellate Body: The good, the bad and the ugly?' (2018) *Institute of International Economic Law* at 2.

⁵⁶ Ibid.

⁵⁷ WTO 'Appellate Body impasse communication from the African Group' (2019) *Trilac* WT/GC/W/776 at 1, available at <https://www.tralac.org/news/article/14119-appellate-body-impasse-communication-from-the-african-group-to-the-wto-general-council.html>, accessed on 10 January 2020.

⁵⁸ Jeffrey Schott & Euijin Jung 'The WTO's existential crisis: How to salvage its ability to settle trade disputes' (2019) PB19-19, *Peterson Institute for International Economics Policy Briefs* at 2.

⁵⁹ Ibid 58 at 2.

⁶⁰ Ibid at 2.

⁶¹ Mitchell op cit note 10 at 81.

⁶² Faizel Ismail *WTO Reform and the Crisis of Multilateralism: A Developing Country Perspective* (2020) at 1, available at https://www.southcentre.int/wp-content/uploads/2020/09/Bk_2020_WTO-reform-and-the-crisis-of-multilateralism_EN.pdf, accessed on 4 September 2020.

⁶³ Danish Kwa & Aileen Kwa 'Crisis at the WTO's Appellate Body (AB): Why the AB is important for developing members' (2019) *South Centre Policy Brief* 69 at 3.

Appellate Body to have legitimacy for discussing the terms of implementation with the violating member'.⁶⁴

This research is also significant because it seeks to contribute to the ongoing discussions on the possible ways to resolve the Appellate Body crisis. As discussed above, the US has rejected all the reform proposals that were submitted by several WTO members since the onset of the impasse in 2017.⁶⁵ In addition, the US did so without submitting its own counter reform proposal each time when it was requested by the other members to do so.⁶⁶ Scholars such as Lehne believe that as long as the US's interests remain unknown to the other member states, the negotiations efforts to reform the WTO dispute settlement system and resolve the Appellate Body crisis will remain unsuccessful.⁶⁷

1.5 Research scope and limitations

The scope of this research focuses on the reform of the WTO dispute settlement system and the concerns raised by the US for blocking the appointment of Appellate Body members since 2017. Prominent scholars such as Ismail have highlighted that the recent reform debates about the WTO dispute settlement system in Geneva were led by the US.⁶⁸ At MC11 in 2017, the USTR Mr Lighthizer raised concerns about the imbalance between the WTO's negotiation and litigation functions.⁶⁹ He argued that some member states believed that they could secure concessions through litigation which they would not get through multilateral trade negotiations.⁷⁰ In addition, the USTR Mr Lighthizer requested the member states to consider whether the current litigation structure of the WTO disputes settlement system was rational.⁷¹

In addition, this research also recognises that the concerns raised by the US about the Appellate Body's judicial conduct form part of its broader WTO reform proposals.⁷² Ismail states that the US's broader WTO reform proposals have been categorised by the European Union (EU) as

⁶⁴Alberto do Amaral Júnior, Luciana Maria de Oliveira Sá Pires, Cristiane Lucena Carneiro *The WTO Dispute Settlement Mechanism: A Developing Country Perspective* 2019 Springer: Brazil at 5.

⁶⁵WTO 'General Council: Minutes of the meeting of 12 December 2018' 20 February 2019 *WTO News*, available at https://www.wto.org/english/news_e/news18_e/sum_gc_dec18_e.htm, accessed on 24 June 2020.

⁶⁶Deepak op cit note 22 at 990.

⁶⁷Lehne op cit note 3 at 26.

⁶⁸Ismail op cit note 62 at 11.

⁶⁹Lighthizer op cit note 36.

⁷⁰Ibid.

⁷¹Ibid.

⁷²Ibid.

follows: ‘Special & Differential Treatment (S&DT), Rule-making (procedural and substantive), Regular work and transparency’.⁷³ First, the US would like the meaning and criteria of what constitutes developing country status in the WTO to be clarified,⁷⁴ so that 34 developing countries that are relatively advanced, wealthy and influential may be excluded from their current developing country status.⁷⁵ Waddoups states that in 2019, the US announced that any country that was a member of or had initiated accession into the Organisation for Economic Co-operation and Development (OCED), a member of the Group of 20 (G20), classified as a high-income country by the World Bank (WB), and accounted for more than 0.5 per cent of world trade should be prohibited from claiming S&DT in current and future trade negotiations.⁷⁶ Second, the US proposed that the consensus approach should be abandoned in favour of plurilateral negotiations because it has proven difficult to attain consensus among the WTO’s 164 members.⁷⁷ As a solution, the US recommended that for instance, in circumstances where a significant number of like-minded member states agree to adopt an issue that has not yet been agreed upon by all, those member states should be allowed to advance the issue and subsequently extend the benefits to others on a most-favoured-nation (MFN) basis.⁷⁸ Third, the US has argued that the WTO was not well equipped to handle the challenges caused by non-market economies members such as China which fails to respect basic principles such as non-discrimination, market access, reciprocity, fairness and transparency.⁷⁹ As a solution, the US suggested that penalties should be imposed against WTO members that fail to comply with the transparency and notification obligations when they adopt new trade policies.⁸⁰ In addition, the US’s proposal encourages the member states to submit counter-notifications on the trade regimes of other member states to the WTO Secretariat.⁸¹

⁷³ Ismail op cit note 62 at 4.

⁷⁴ Lighthizer op cit note 36.

⁷⁵ Chen Fengying & Sun Lipeng ‘The United States’ role in WTO reform’ (2019) 76 *China International Studies* at 92.

⁷⁶ Madeleine Waddoups ‘Quantifying “Developing Nation” for International Trade’ (2019) 18 *Center for Strategic & International Studies*, available at <https://www.csis.org/quantifying-developing-nation-international-trade>, accessed on 30 July 2020.

⁷⁷ Op cit note 75 at 96.

⁷⁸ Lighthizer op cit note 36.

⁷⁹ Op cit note 25 at 20.

⁸⁰ Markus Wagner ‘The impending demise of the WTO Appellate Body: From centrepiece to historical relic?’ in Chang-fa LoJunji NakagawaTsai-fang Chen (ed) *The Appellate Body of the WTO and Its Reform*, (2020) at 73.

⁸¹ WTO ‘WTO members consider transparency reforms at Goods Council meeting’ *WTO News* January 2019, available at https://www.wto.org/english/news_e/news19_e/good_10jul19_e.htm, accessed on 20 July 2020.

1.6 Research methodology

The research is literature based, and the methodology adopted is an analytical approach. This approach will be used to critically analyse existing literature on the subject matter. Both primary and secondary literature sources will be used. For example, the legal texts of the covered agreements such as the DSU, GATT 1947 among others will be used as primary sources. Secondary sources will include panel reports and the Appellate Body reports (WTO jurisprudence or cases); WTO annual reports and the Appellate Body annual reports; minutes of the DSB meetings, statements and speeches made by WTO members as well as senior officials of the WTO; scholarly books; journal articles; research reports drafted by trade law experts and research organisations such as the Consumer Unity & Trust Society (CUTS International), the International Centre for Trade and Sustainable Development (ICTSD), the United Nations Conference on Trade and Development (UNCTAD), and the office of the United States Trade Representative (USTR), among others.

1.7 Structure of the research

The research is divided into five chapters:

Chapter 1 is the introductory chapter that includes but is not limited to the background, research problem, research questions and objectives, research scope and outlines the chapters of the research.

Chapter 2 provides a historical overview of the WTO dispute settlement system and highlights some of the key features that were introduced by the member states at the end of the Uruguay Round negotiations.

Chapter 3 discusses the concerns that the US has raised about the Appellate Body's failure to respect the rules of the WTO. These concerns have been divided into procedural and substantive issues.

Chapter 4 is an academic attempt to critically analyse the merits of the US's concerns. Several Appellate Body reports that have been issued since the WTO's establishment will be used as case studies to support the arguments.

Chapter 5 concludes the research and summarises the findings of the previous chapters. It also offers recommendations to bypass the Appellate Body crisis and ensure that appeals are resolved while permanent solutions are sought by the member states.

Chapter 2: The origins of the WTO dispute settlement system

2. Introduction

The previous chapter provided the background of the Appellate Body crisis and highlighted its impact on the WTO dispute settlement system. This chapter traces the historical trajectory of the WTO dispute settlement system. It will demonstrate that prior to the establishment of the WTO in 1995, trade disputes were governed by two provisions of the GATT 1947, but the dispute settlement system had several weaknesses which compelled the contracting parties to take measures into their own hands. The end of the Uruguay Round in 1994 resulted in a binding and compulsory state-to-state dispute settlement mechanism with powerful adjudicative bodies such as the Appellate Body. However, despite these achievements, the WTO dispute settlement system continues to face challenges that threatens to undermine its viability.

2.1 The GATT 1947 dispute settlement system

The WTO dispute settlement system is considered as one of the most important innovations of the Uruguay Round negotiations.⁸² However, this does not mean that its predecessor, the GATT 1947, did not have a dispute settlement system.⁸³ In contrast, the WTO dispute settlement system is based on the experience of the dispute settlement system that existed under GATT 1947 which provided a backbone for the multilateral trading system for almost five decades after the Second World War (WW II) in the 1940s.⁸⁴ For example, art 3.1 of the DSU provides that the '[M]embers affirm their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947, and the rules and procedures as further elaborated and modified herein'.

According to Waincymer, the main aim of the GATT 1947 dispute settlement system was to 'restore the balance of advantages between the parties'.⁸⁵ However, GATT 1947 was not an international organisation for trade per se and it did not provide for an elaborative dispute

⁸² WTO *Dispute Settlement System Training Module: Chapter 2: Historic Development of the WTO Dispute Settlement System*, available at https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c2slp1_e.htm, accessed on 12 February 2020.

⁸³ Ibid.

⁸⁴ Bown & Keynes op cit note 33 at 1.

⁸⁵ Jeffrey Waincymer 'GATT dispute settlement: An agenda for evaluation and reform' (1985) 14(1) *North Carolina Journal of International Law* at 85.

settlement system.⁸⁶ In fact, trade disputes at the time were settled on the basis of arts XXII and XXIII of GATT 1947.⁸⁷ According to para 1 of art XXII of GATT 1947, each contracting party was required to ‘afford adequate opportunity for consultation on any matter raised pertaining to this agreement’. In other words, the contracting parties were required to have consultations first before bringing the matter to a panel of experts for adjudication.⁸⁸ If the consultations failed to resolve the matter, art XXIII of GATT 1947 permitted the complaining contracting party to request the establishment of a panel to investigate and issue a ruling.⁸⁹ However, in the early years of the GATT 1947 dispute settlement system, disputes were heard by the Chairman of the GATT Council.⁹⁰ Later, they were brought to the working parties composed of government representatives who adopted the reports by positive consensus.⁹¹ From the 1950s, the working parties were replaced by a panel of independent experts whose issued reports were submitted to the GATT Council for approval.⁹² Jackson, Hudec and Davis stated that those reports could only become binding after they had been approved by the GATT Council through positive consensus.⁹³

For many decades, the GATT 1947 dispute settlement system proved to be successful in resolving trade disputes between the contracting parties.⁹⁴ For example, a total of 132 panel reports were issued and only 101 were adopted under the GATT 1947 dispute settlement system.⁹⁵ Hudec argues that the initial success could have been attributed to the willingness among the disputants to resolve their differences amicably even if it meant having to compromise.⁹⁶ Its effectiveness was, however, frustrated by several weaknesses particularly around the 1980s and the 1990s.⁹⁷ First, it was the requirement of positive consensus from all

⁸⁶ Gerd Droege *Membership in international Organizations: Paradigms of Membership Structures, Legal Implications of Membership and the Concept of International Organization* (2020) T.M.C. Asser Press at 277.

⁸⁷ Mitsuo Matsushita, Thomas Schoenbaum, Petros Mavroidis et al *The World Trade Organization: Law, Practice and Policy* 3 ed (2015) at 86.

⁸⁸ David Palmeter & Petros Mavroidis *Dispute Settlement in the World Trade Organization: Practice and Procedure* 2nd ed (2004) Cambridge University Press at 7.

⁸⁹ *Ibid* at 7–8.

⁹⁰ WTO op cit note 82.

⁹¹ *Ibid*.

⁹² *Ibid*.

⁹³ John Jackson, Robert Hudec & Donald Davis ‘The role and effectiveness of the WTO dispute settlement mechanism’ (2000) *Brookings Trade Forum* at 183.

⁹⁴ Peter van den Bossche & Werner Zdouc *The Law and Policy of the World Trade Organization: Text, Cases and Materials* 4th ed (2017) Cambridge University Press at 159.

⁹⁵ Elin Østebø Johansen *WTO Dispute Settlement Body Developments in 2011*, available at https://www.wto.org/english/tratop_e/dispu_e/speech_johansen_13mar12_e.htm, accessed on 20 February 2020.

⁹⁶ Robert Hudec ‘The new WTO Dispute Settlement Procedure: An overview of the first three years’ (1999) 8(1) *Minnesota Journal of International Law* at 5–6.

⁹⁷ WTO op cit note 82.

the contracting parties at every stage of the dispute settlement.⁹⁸ These stages included the decision on the establishment of a panel, the adoption of a panel report and the authorisation of retaliation.⁹⁹ This meant that each contracting party, as well as the defendant to the dispute, could block any of the stages in the dispute settlement process by voting against the request.¹⁰⁰ Second, the system had no strict time limits for the panel proceedings,¹⁰¹ and that caused several disputes to drag on inconclusively for many years.¹⁰² Third, the system had no ‘legally binding enforcement powers’.¹⁰³ This meant that compliance with the panel rulings depended a lot on the political will of the contracting parties.¹⁰⁴ Lehne argues that these above-mentioned difficulties eventually became a major problem for the US particularly around the 1980s and early 1990s.¹⁰⁵ The US resorted to imposing unilateral trade sanctions under the s 301 of the Trade Act of 1974 (Section 301) to safeguard its trade interests, which in turn angered its trading partners.¹⁰⁶

2.2 The Uruguay Round negotiations and the establishment of the DSU

The Uruguay Round was the 8th round of multilateral trade negotiations conducted under the auspices of GATT 1947.¹⁰⁷ It was launched in 1986 by 123 contracting parties in Punta del Este, Uruguay.¹⁰⁸ Young states that the improvement and strengthening of the rules and procedures of the GATT 1947 dispute settlement system was one of the key objectives among the trade negotiators during the round.¹⁰⁹ The trade negotiators had also agreed that the agenda would include the establishment of a monitoring and evaluation mechanism to facilitate compliance with the adopted recommendations.¹¹⁰ Vidigal argues however, that developed countries such as the US had pressured for the establishment of a binding and enforceable dispute settlement system.¹¹¹ The Uruguay Round negotiations were successfully concluded in

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ Van den Bossche & Zdouc op cit note 94 at 159.

¹⁰¹ WTO op cit note 8.

¹⁰² Ibid.

¹⁰³ Hudec op cit note 96 at 10.

¹⁰⁴ WTO op cit note 82 at 103.

¹⁰⁵ Lehne op cit note 3 at 1.

¹⁰⁶ Ibid.

¹⁰⁷ Sada Saxena ‘The Uruguay Round: Expectations of developing countries’ (1988) 23(6) *Intereconomics* at 269.

¹⁰⁸ WTO *Understanding the WTO: Basics: The Uruguay Round*, available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm, accessed on 16 February 2020.

¹⁰⁹ Michael Young ‘Dispute resolution in the Uruguay Round: Lawyers triumph over diplomats’ (1995) 29(2) *The International Lawyer* at 389.

¹¹⁰ GATT *Ministerial Declaration on the Uruguay Round* (1986), at 7, available at https://www.wto.org/gatt_docs/English/SULPDF/91240152.pdf, accessed on 20 February 2020.

¹¹¹ Vidigal op cit note 54 at 865.

in 1993,¹¹² and they brought about an adjudicatory, effective and a rule-oriented system to resolve trade disputes,¹¹³ that was embodied in the DSU.¹¹⁴ The DSU is contained in Annex 2 of the WTO Agreement and it introduced several key institutional changes that addressed some of the concerns that existed in the previous dispute settlement system. Each of these changes are summarised below.

2.2.1 Single and integrated dispute settlement system

The DSU established a single and integrated dispute settlement system that applies to all disputes arising under any of the covered agreements listed in Appendix 1 of the DSU.¹¹⁵ These covered agreements consist of the DSU itself, the WTO Agreement, the GATT 1947 and the General Agreement on Trade in Services (GATS), among others.¹¹⁶ However, the application of the DSU is subject to the ‘special and additional rules and procedures’ on dispute settlement that are contained in the covered agreements.¹¹⁷ According to the WTO, the ‘special and additional rules and procedures’ are the specific rules and procedures that are ‘designed to deal with the particularities of disputes under a specific covered agreement’.¹¹⁸

2.2.2 Compulsory and exclusive jurisdiction

The jurisdiction of the WTO dispute settlement system is exclusive and compulsory in nature.¹¹⁹ Article 23 of the DSU provides that if a member state believes that the actions of another member state has violated any of the covered agreements, that member state is prohibited from using other fora to resolve a WTO related dispute.¹²⁰ This means that all the member states are subject to the dispute settlement system because they signed and ratified the WTO Agreement as a single undertaking at the time of accession.¹²¹ In addition, the WTO dispute settlement system guarantees equal access to all member states regardless of their

¹¹² WTO *The Uruguay Round*, available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm, accessed on 20 February 2020.

¹¹³ Young op cit note 109 at 396.

¹¹⁴ WTO *Dispute Settlement System Training Module: Chapter 1: Introduction to the WTO dispute settlement system*, available at https://www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/c1s2p1_e.htm, accessed on 24 February 2019.

¹¹⁵ DSU art 1.1.

¹¹⁶ WTO Legal basis for a dispute available at https://www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/c4s1p1_e.htm, accessed on 25 June 2020.

¹¹⁷ DSU art 1.2 and Appendix 2.

¹¹⁸ WTO op cit note 114.

¹¹⁹ WTO Secretariat *A Handbook on the WTO Dispute Settlement System* 2 ed (2017) Cambridge University Press at 16.

¹²⁰ Ibid at 16.

¹²¹ Ibid at 16–17.

economic or political status.¹²² In *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, the panel ruled that access to the WTO dispute settlement process was limited to the member states only.¹²³ However, the ruling was overturned by the Appellate Body when it held that non-state actors (such as individuals, companies and international organisations) with strong interests in the matter can request permission to file *amicus curiae* submissions.¹²⁴

2.2.3 The Dispute Settlement Body (DSB)

The DSU created a political body known as the DSB. Paine state that the DSB is comprised of the representatives of all the members of the WTO and they administer the rules and procedures embodied in the DSU.¹²⁵ In addition, the DSB has the authority to establish panels, adopt panel and Appellate Body reports, appoint new members of the Appellate Body, monitor and implement rulings, and to authorise the suspension of concessions for failure to comply with the issued rulings or recommendations.¹²⁶

2.2.4 The negative or reverse consensus decision-making rule

The DSU replaced the positive consensus decision-making rule that was required at every stage of the GATT 1947 dispute settlement system with negative or reverse consensus.¹²⁷ First, the DSU provides that a panel shall be established if a request is made by a complaining party unless the DSB decides by consensus not to establish it.¹²⁸ Second, the DSU provides that if an appeal is not filed by either of the parties, the panel report must be adopted by the DSB unless the DSB decides to vote against it.¹²⁹ Third, if an appeal is filed, the DSU provides that the Appellate Body report must be adopted by the DSB unless it decides by consensus not to adopt it.¹³⁰ In a nutshell, the rule of negative or reverse consensus in the system has guaranteed the establishment of a panel when requested as well as the automatic adoption of panel or Appellate Body reports once they have been placed on the DSB's agenda.

¹²² Ibid at 17.

¹²³ Appellate Body Report *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, para 101.

¹²⁴ WTO Participation in Dispute Settlement Proceedings, available at https://www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/c9s3p1_e.htm, accessed on 20 February 2020.

¹²⁵ Joshua Paine 'The functions of the WTO's dispute settlement body: A distinctive voice mechanism' (2018) *Social Science Research Network* at 2.

¹²⁶ DSU art 2.1.

¹²⁷ Turkey op cit note 2 at 9.

¹²⁸ DSU art 6.1.

¹²⁹ DSU art 16.4.

¹³⁰ DSU art 17.14.

2.2.5 The establishment of the Appellate Body review

Although the Appellate Body was not thought of initially, it was designed to be a safety measure to prevent the automatic adoption of legally flawed panel reports.¹³¹ Bacchus and Simon argue that at the time of its establishment, the members of the WTO had expected that appeals would be minimal and narrow in scope.¹³² However, the demand of appeals turned out to be much higher than what was initially expected.¹³³ For example, between 1995 and 2014 an average of 66.85 per cent of the disputes were appealed but later increased to almost 90 per cent in 2016.¹³⁴

2.2.6 Establishment of strict time frames for concluding disputes

The DSU sets out strict timeframes for each stage of the of the WTO dispute settlement process.¹³⁵ For example, art 4.7 of the DSU allocates 60 days for the consultations procedure, art 12.9 of the DSU requires that panel reports should be issued within six months of the panel's composition, but not later than nine months and art 17.2 of the DSU requires that Appellate Body reports should be issued within 60 days of an appeal but no later than 90 days in exceptional circumstances.

2.2.7 Establishment of a mechanism to ensure compliance with rulings

The reluctance among the contracting parties to follow the recommendations of the panel reports after they had been adopted was one of the major weaknesses of the GATT 1947 dispute settlement system.¹³⁶ Young argues that the DSU has created rules that encourage a respondent to comply with decisions or rulings while the aggrieved party is authorized to withdraw the relevant concessions against the non-complying member if it wishes to do so.¹³⁷ According to the WTO, the purpose of retaliation is to compel the respondent to bring its inconsistent

¹³¹ Bahri op cit note 21 at 294.

¹³² James Bacchus & Simon Lester 'The rule of precedent and the role of the Appellate Body' (2020) 54(2) *Journal of World Trade* at 186.

¹³³ Ibid.

¹³⁴ Elvire Fabry & Erik Tate 'Saving the WTO Appellate Body or Returning to the Wild West of Trade?' (2018) at 5, available at <http://institutdelors.eu/wp-content/uploads/2018/05/SavingtheWTOAppellateBody-FabryTate-June2018.pdf>, accessed on 2 May 2020.

¹³⁵ WTO 'Introduction to the WTO dispute settlement system' available at https://www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/c1s3p3_e.htm accessed on 20 February 2020.

¹³⁶ Young op cit note 109 at 404.

¹³⁷ Ibid.

measure in line with the rules of the WTO.¹³⁸ In addition, the DSU requires that retaliation ought to have been approved by the DSB before it can be applied.¹³⁹

2.3 The institutions of the WTO dispute settlement process

In general, the primary participants in the WTO dispute settlement process are the member states, acting as parties and third parties to a case.¹⁴⁰ Van den Bossche and Zdouc state that there are several bodies that are involved in the WTO dispute settlement process and they include the DSB, panels and the Appellate Body.¹⁴¹

2.3.1 The DSB

As already mentioned above, the DSB is a political body and the alter ego of the WTO General Council.¹⁴² According to the WTO Agreement, the General Council convenes as the DSB to oversee the rules and procedures contained in the DSU.¹⁴³ The DSB has exclusive authority to ‘determine panels, adopt panel and the Appellate Body reports, monitor the implementation of rulings, recommendations, and to authorise suspension of concessions and other obligations under the covered agreements’.¹⁴⁴ In addition, the DSB has authority to appoint new Appellate Body members,¹⁴⁵ and to adopt the rules of conduct for the WTO dispute settlement system.¹⁴⁶

Article 2.4 of the DSU provides that the decisions of the DSB must always be taken by consensus. When, however, the DSB establishes panels, adopts the panel or the Appellate Body reports or authorises retaliation, the DSU requires the decision to be taken by reverse or negative consensus.¹⁴⁷ The DSU also requires the DSB to meet as often as necessary to fulfil its functions and to also meet the timeframes provided for in the DSU.¹⁴⁸ In practice, the DSB has one regular meeting each month while special meetings are only convened by the Director-

¹³⁸ WTO *The WTO at Twenty: Challenges and Achievements* (2015) World Trade Organization at 64, available at https://www.wto.org/english/res_e/publications_e/wto_at_twenty_e.htm, accessed on 3 July 2020.

¹³⁹ DSU art 22.2.

¹⁴⁰ Op cit note 114.

¹⁴¹ Van den Bossche & Werner Zdouc op cit note 94 at 205.

¹⁴² Van den Bossche *The Law and Policy of the World Trade Organization: Text, Cases and Materials* 2nd ed (2012) Cambridge University Press at 15.

¹⁴³ WTO Agreement op cit note 46 art IV:2; DSU art 2.1.

¹⁴⁴ DSU art 2.1.

¹⁴⁵ DSU art 17.2.

¹⁴⁶ WTO *Dispute Settlement System Training Module: Chapter 3: WTO Bodies Involved in the dispute settlement process*, available at https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s1p1_e.htm, accessed on 22 February 2020.

¹⁴⁷ DSU arts 6.1, 16.4, 17.14 and 22.6.

¹⁴⁸ DSU art 2.3.

General whenever requested by members.¹⁴⁹ In addition, the DSU provides that the DSB shall receive administrative support from the WTO Secretariat.¹⁵⁰

2.3.2 The panels

Panels are the ‘quasi-judicial bodies’ that adjudicate disputes between member states in the first instance.¹⁵¹ They are established by the DSB at the request of a complaining party to a dispute unless there is consensus not to take the decision.¹⁵² According to the DSU, panels are responsible for making an objective assessment of the factual and legal aspect of a case and to submit its findings and conclusions contained in a report to the DSB for approval.¹⁵³ Moreover, panels are normally composed of three to five panellists that are selected on an ad hoc basis.¹⁵⁴ This means that there are no permanent panel members in the WTO but a different panel is established whenever a dispute arises.¹⁵⁵

Article 8.1 of the DSU provides that anyone who is independent and qualified is potentially eligible to serve as a panellist. In addition, panellists shall be composed of well-qualified government or non-governmental persons who have published widely on international trade law or policy.¹⁵⁶ However, the number of lawyers and academics that are serving as panellists has been increasing over the past few years.¹⁵⁷ According to the DSU, the WTO Secretariat keeps an ‘indicative list’ of names from which potential panellists may be drawn.¹⁵⁸ Moreover, the members of the WTO are allowed to propose names to be included in the indicative list and that has always been approved without problems.¹⁵⁹ However, citizens of member states whose governments are parties to the dispute cannot serve on a panel related to that dispute unless the parties decide otherwise.¹⁶⁰ Panel members are required to be independent of their member states while the member states themselves are banned from influencing the panel’s functions.¹⁶¹

¹⁴⁹ WTO op cit note 146.

¹⁵⁰ DSU art 27.1.

¹⁵¹ WTO op cit note 146.

¹⁵² DSU art 6.1.

¹⁵³ DSU art 11.

¹⁵⁴ DSU art 8.5.

¹⁵⁵ WTO op cit note 146.

¹⁵⁶ DSU art 8.1.

¹⁵⁷ United Nations Conference on Trade and Development (UNCTAD) *Dispute Settlement* 2003 at 9, available at https://unctad.org/en/Docs/edmmisc232add17_en.pdf, accessed on 24 August 2020.

¹⁵⁸ DSU art 8.4.

¹⁵⁹ WTO op cit note 146.

¹⁶⁰ DSU art 8.3.

¹⁶¹ DSU art 8.9.

2.3.3 Appellate Body

Smit argues that the Appellate Body is not an official international court for trade but a permanent tribunal exercising ‘quasi-judicial’ functions.¹⁶² It is comprised of seven members (who are known as judges) that are appointed by the DSB to hear appeals from the panel proceedings.¹⁶³ However, a quorum of three Appellate Body members is required to serve on each case and they must do so in rotation.¹⁶⁴ Article 17.1 of the DSU provides that the rotation is determined in the Working Procedures for Appellate Review. In addition, the members of the Appellate Body have been appointed are expected to serve a four-year term and each person’s term may only be renewed once.¹⁶⁵ However, the possibility of being reappointed by the DSB is not guaranteed.

The DSU requires that the membership of the Appellate Body must be comprised of persons with recognised authority, as experts in law, international trade or any other related subject matter of the WTO covered agreements.¹⁶⁶ However, most of the Appellate Body members so far have been persons who were judges, occupied senior positions in government, or were practising lawyers and university professors.¹⁶⁷ However, these judges are not full-time employees of the WTO but travel to Geneva when it is necessary to decide an appeal.¹⁶⁸ The DSU requires that the membership of the Appellate Body should be ‘broadly representative of the membership in the WTO and that the members should not be affiliated with any government.’¹⁶⁹

Typically, an appeal in the WTO can only be initiated by any of the parties to a dispute. This means that the member states that participated as third parties at the panel proceedings are prohibited from filing appeals. In addition, the DSU provides that ‘an appeal is limited to the legal aspects covered in the panel reports and the legal interpretation that was developed in those reports’.¹⁷⁰ According to art 17.13, the members of the Appellate Body have the authority to ‘uphold, modify, or reverse the legal findings and conclusions of the panels that were

¹⁶² Smith op cit note 14 at 66.

¹⁶³ DSU art 17.1.

¹⁶⁴ DSU art 17.1.

¹⁶⁵ DSU art 17.2.

¹⁶⁶ DSU art 17.3.

¹⁶⁷ WTO *Dispute Settlement: Members: Appellate Body Members*, available at https://www.wto.org/english/tratop_e/dispu_e/ab_members_bio_e.htm, accessed on 15 February 2020.

¹⁶⁸ UNCTAD op cit note 157 at 5.

¹⁶⁹ DSU art 17.3.

¹⁷⁰ DSU art 17.6.

appealed'. In addition, the recommendations and rulings provided by the Appellate Body cannot add to nor diminish any rights provided in covered agreements.¹⁷¹ For example, the members of the Appellate Body are not supposed to engage in judicial activism such as issuing advisory opinions on issues that were not raised in appeals or crucial in resolving the appeal.¹⁷²

2.3.4 Other entities involved in the WTO dispute settlement system

In addition to the above-mentioned bodies, there are other institutions and individuals that are involved in the WTO dispute settlement system.¹⁷³ These institutions and individuals include the chair of the DSB,¹⁷⁴ the WTO Director-General,¹⁷⁵ arbitrators,¹⁷⁶ experts,¹⁷⁷ expert review groups,¹⁷⁸ technical experts groups,¹⁷⁹ the permanent group of experts,¹⁸⁰ and the facilitator.¹⁸¹

2.4 The WTO dispute settlement process

As discussed in chapter 1, trade disputes in the WTO can be settled in two main ways, namely bilateral consultations between the governments concerned or through adjudication by the panels or the Appellate Body (if appealed).¹⁸² The WTO dispute settlement process under the DSU comprises three main stages, namely consultations, adjudication and the implementation of the rulings.¹⁸³

2.4.1 Consultations

The WTO dispute settlement process is always initiated with a formal request for consultations by the government of a member state regarding complaints made against another government of a member state.¹⁸⁴ The purpose of holding consultations is for the governments concerned

¹⁷¹ DSU art 3.2.

¹⁷² Kelsey Cox 'Vetoing WTO Appellate Body judges' reappointments: Analysing the United States' actions through neo-realist lenses' (2019) 42(1) *Houston Journal of International Law* at 6.

¹⁷³ Van den Bossche & Zdouc op cit note 94 at 244.

¹⁷⁴ WTO Agreement op cit note 46 art IV:3.

¹⁷⁵ DSU art 5.6.

¹⁷⁶ DSU art 21.3; 22.6 and 25.

¹⁷⁷ DSU art 13.1 and 13.2; Sanitary and Phytosanitary (SPS) Agreement art 11.2; Technical Barriers to Trade (TBT) Agreement art 14.

¹⁷⁸ DSU Appendix art 13.2.

¹⁷⁹ TBT Agreement op cit note 177 art 14.3 and Annexure 2.

¹⁸⁰ WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement) art 4.5.

¹⁸¹ WTO 'General Council Chair appoints facilitator to address disagreement on Appellate Body', available at https://www.wto.org/english/news_e/news19_e/gc_18jan19_e.htm, accessed on 24 August 2020.

¹⁸² *WTO Dispute Settlement System Training Module: Chapter 6: The Process: Stages in a Typical WTO Dispute Settlement Case*, available at https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s1p1_e.htm, accessed on 23 February 2020.

¹⁸³ Ibid.

¹⁸⁴ DSU art 4.

to try to resolve the dispute themselves before they advance to the adjudicative stage.¹⁸⁵ Jackson, Hudec and Davis argued that the consultations were designed to provide an opportunity for the parties involved to clarify the facts, to understand the nature of the complaint and for each to explain their positions in the matter.¹⁸⁶

2.4.2 Adjudication

If the consultations failed to resolve the matter in dispute, the complainant may request the DSB to establish an ad hoc panel to assess the dispute.¹⁸⁷ In terms of art 6.1 of the DSU, when a request for the establishment of a panel has been made by a complainant, the DSB has no choice but to approve it unless there is consensus to do otherwise. Following the DSB's approval of the complainants request to establish a panel, the terms of reference of the panel will then be drawn up.¹⁸⁸ As already discussed above, panels are normally composed of three to five panellists who are selected on an ad hoc basis.¹⁸⁹ The DSU provides that each of the panel members are selected from the Secretariat's indicative list.¹⁹⁰ However, if the parties cannot agree, the WTO Director-General may be asked to select appropriate panellists on their behalf.¹⁹¹ The DSU provides that the function of a panel is to make an objective assessment to determine whether the challenged measure complies with WTO laws.¹⁹² As soon as that is concluded, an interim report will be drafted and circulated to the parties to make comments.¹⁹³ The final panel report will then be issued and circulated to the DSB for adoption.¹⁹⁴

Similarly, if the panel report is appealed, the DSB will not adopt it but will rather refer it to the Appellate Body to conduct a legal review.¹⁹⁵ The Appellate Body proceedings are initiated by a written notification to the DSB and a notice of appeal filed with the Appellate Body Secretariat.¹⁹⁶ As mentioned above, the review scope of the Appellate Body is only 'limited to issues of law covered in the panel report and legal interpretations developed by the panel'.¹⁹⁷

¹⁸⁵ WTO op cit note 182.

¹⁸⁶ Jackson, Hudec & Davis op cit note 93 at 186.

¹⁸⁷ DSU art 4.7.

¹⁸⁸ DSU art 7.

¹⁸⁹ DSU art 8.5.

¹⁹⁰ DSU art 8.4.

¹⁹¹ DSU art 8.7.

¹⁹² DSU art 11.

¹⁹³ DSU art 15.

¹⁹⁴ DSU art 16.4.

¹⁹⁵ DSU art 16.4.

¹⁹⁶ WTO *Dispute Settlement: Procedures: Appellate Procedures*, available at https://www.wto.org/english/tratop_e/dispu_e/ab_procedures_e.htm, accessed on 17 February 2020.

¹⁹⁷ DSU art 17.6.

As with the panel proceedings, oral and written submissions will be made and these will be followed by a hearing.¹⁹⁸ The Appellate Body will at the end of the review, issue its decision in a report which will either ‘uphold, modify or reverse the decision of the panel’.¹⁹⁹ In terms of the DSU, Appellate Body reports are automatically adopted by the DSB unless it decides otherwise.²⁰⁰

2.4.3 Implementation and countermeasures

As soon as the panel or the Appellate Body report has been adopted by the DSB, the losing party is expected to comply with its recommendations.²⁰¹ For example, in cases where the report has found that a measure was inconsistent with any of the covered agreements, the recommendations usually require that the respondent should ‘bring its measures in conformity with the WTO agreement’.²⁰² The losing party will either comply with the recommendations immediately or request a reasonable time to implement the recommendations and rulings of the DSB.²⁰³ In terms of the DSU, the reasonable period may be determined in three ways: (a) proposed by the respondent and approved by the DSB;²⁰⁴ (b) decided by the parties within 45 days after the adoption of a panel or the Appellate Body report;²⁰⁵ and (c) decided by an arbitrator within 90 days after the adoption of a panel or the Appellate Body report.²⁰⁶

According to art 21.6, the DSB will also monitor the implementation of the adopted recommendations or rulings. If such implementation is not satisfactory, a compliance panel will be established to conduct an assessment of whether the implemented measure complies with the panel or Appellate Body ruling or whether it is consistent with the covered agreements.²⁰⁷ Article 22 of the DSU provides that if the assessment of the compliance panel finds that there is non-compliance, the complainant will be allowed to resort to the adoption of the following temporary measures, namely, a request for compensation or the suspension of its WTO obligations. The term ‘compensation’ in the WTO does not refer to a monetary payment

¹⁹⁸ DSU art 17.

¹⁹⁹ DSU art 17.13.

²⁰⁰ DSU art 17.14.

²⁰¹ DSU art 19.

²⁰² DSU art 19.1.

²⁰³ DSU art 21.3.

²⁰⁴ DSU art 21.3.a.

²⁰⁵ DSU art 21.3.b.

²⁰⁶ DSU art 21.3.c.

²⁰⁷ DSU art 22.2.

per se.²⁰⁸ Instead, the respondent is supposed to offer additional benefit to the other party in the form of a tariff reduction for as long as compliance is not achieved.²⁰⁹ The suspension of obligations comprises the right to impose trade sanctions against the respondent that failed to implement a ruling.²¹⁰ However, art 22.2 of the DSU provides that prior authorisation from the DSB must first be sought before retaliation may be applied. Most importantly, the DSU requires that the level of retaliation authorised by the DSB must be ‘equivalent’ to the level of nullification or impairment.²¹¹ Article 2.1 of the DSU grants the DSB the authority to continue to maintain the surveillance of the implementation of rulings and recommendations of panels or the Appellate Body, for as long as the implementation is considered unsatisfactory. In addition, the WTO dispute settlement system provides other methods of settling disputes,²¹² and these include good offices, conciliation, mediation,²¹³ and arbitration.²¹⁴

2.5 The negotiations to improve the WTO dispute settlement system

The need to reform the WTO dispute settlement system is widely acknowledged by the member states.²¹⁵ McDougall argues that the US has been critical of the WTO dispute settlement system almost from the beginning.²¹⁶ As such, discussions to review the DSU have always been on the agenda since the early 1990s.²¹⁷ Kao argues that at the Ministerial Conference held in Marrakesh, Morocco in 1994, the ministers were mandated to conduct a review of the rules and procedures of the DSU within a period of four years following the adoption of the WTO Agreement on 1 January 1995.²¹⁸ The review was launched by the DSB in late 1997 and several proposals were submitted by the participants but they failed to finalise the negotiations before the set deadline.²¹⁹ Hohmann argues that the review deadline was extended until 1999

²⁰⁸ Marco Bronckers & Van den Broek Naboth ‘Financial compensation in the WTO: Improving the remedies of WTO dispute settlement’ (2005) 8(1) *Journal of International Economic Law* at 107.

²⁰⁹ *Ibid* at 107.

²¹⁰ WTO The Process: Stages in a Typical WTO Dispute Settlement Case, available at https://www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/c6s10p1_e.htm, accessed on 22 March 2020.

²¹¹ DSU art 22.4.

²¹² Van den Bossche op cit note 142 at 48.

²¹³ DSU art 5.

²¹⁴ DSU art 25.

²¹⁵ Chiara Giuliani ‘Multilateral trade in crisis: The WTO’s Appellate Body and the risk of paralysis’ (2019) 19 (49) *IAI Commentaries* at 3.

²¹⁶ McDougall op cite note 28 at 1.

²¹⁷ WTO *Negotiations to Improve Dispute Settlement Procedures*, available at https://www.wto.org/english/tratop_e/dispu_e/dispu_negs_e.htm, accessed on 23 February 2020.

²¹⁸ Moshe Kao ‘WTO Reform: Old Debate New Realities’ (2019) *Friedrich-Ebert-Stiftung* at 8, available at <http://library.fes.de/pdf-files/bueros/genf/15845.pdf>, accessed on 20 March 2020.

²¹⁹ WTO *The Doha Declaration Explained*, available at https://www.wto.org/english/tratop_e/dda_e/dohaexplained_e.htm, accessed on 15 February 2020.

but the negotiators were still unable to reach consensus on the results of the review.²²⁰ In 2001, at the 4th Ministerial Conference (MC4) held in Doha, Qatar, the ministers agreed to commence with the negotiations to ‘improve and clarify the WTO dispute settlement system’.²²¹ Furthermore, they agreed that the negotiations would be led in special sessions of the DSB.²²² Again, these efforts did not lead to an agreement. Lehne argues that most recently, at the 11th Ministerial Conference (MC11) held in Buenos Aires, Argentina in 2017, the US called for major WTO reform particularly the dispute settlement system and the functions of the members of the Appellate Body.²²³ Since then, several reform proposals to improve the system have been submitted but none of them have led to an agreement so far.²²⁴ It remains to be seen whether the members of the WTO will eventually reach consensus and improve the dispute settlement system.

2.6 Conclusion

This chapter has discussed the history of the WTO dispute settlement system. It explained that the system is built on the rules, procedures and practices that were developed under the GATT 1947 dispute settlement system. In addition, the chapter further outlined some of the key institutional changes that were introduced to the WTO dispute settlement system at the end of the Uruguay Round, namely the fixed timetables, the specific procedures, and the establishment of powerful adjudicative bodies such as the Appellate Body. However, the WTO dispute settlement system also has several imperfections, one of which had prompted the US to block the appointment of new Appellate Body members since 2017. The following chapter will discuss the concerns raised by the US about the WTO dispute settlement system and the Appellate Body’s judicial functions.

²²⁰ Harald Hohmann *Agreeing and Implementing the Doha Round of the WTO* (2010) Cambridge University Press at 271.

²²¹ Lehne op cit note 3 at 115.

²²² William J. Davey *Enforcing World Trade Rules: Essays on WTO Dispute Settlement and GATT Obligations* (2006) Cameron at 55.

²²³ Lehne op cit note 3 at 115.

²²⁴ Carim Xavier *WTO Dispute Settlement Body: Developments in 2016*, available at https://www.wto.org/english/tratop_e/dispu_e/carim318_e.htm, accessed on 2 November 2019.

Chapter 3: US dissatisfactions with the Appellate Body

3. Introduction

The previous chapter has outlined the history WTO dispute settlement system as well as the key institutions involved. This chapter, however, will discuss the concerns that multiple US administrations have raised about of the Appellate Body's failure to adhere to the rules set by WTO members. These concerns have been divided into procedural and substantive issues. However, before they are discussed, the chapter will explain the reasons why the US is arguably retreating from the multilateral trading order it helped to build after the end of the Second World War (WWII) in the late 1940s in favour of unilateral actions. The last part of the chapter will offer closing remarks.

3.1 Trump's protectionism and its scepticism towards multilateral cooperation

Dodwell argues that during his 2016 presidential campaign, President Donald Trump pledged to revamp US trade policy and prioritise advancing the economic interests of Americans in world trade.²²⁵ He also claimed that the US had been poorly served by disastrous, unfair and outdated Regional Trade Agreements (RTAs) such as the Trans-Pacific Partnership (TPP), the North American Free Trade Agreement (NAFTA) and the United States-Korea Free Trade Agreement (KORUS FTA).²²⁶ Williams argues that these RTAs which were negotiated by previous US administrations,²²⁷ were said to have damaged the US's trade interests and reduced the economic opportunities for many American workers and businesses.²²⁸ Sperling & Webber argue that since he took office on 20 January 2017, President Trump has pursued a very aggressive protectionist trade agenda that threatens to unravel decades of a liberal international order which the US helped to build in the late 1940s.²²⁹ Within few days in the White House, President Trump fulfilled that key campaign promise by signing an executive order to formally withdraw the US from the TPP and began to renegotiate both the NAFTA and the KORUS FTAs.²³⁰

²²⁵ David Dodwell 'Trump's protectionism threatens to unravel decades of trade liberalisation' *SCMP* 11 November 2016, available at <https://www.scmp.com/business/global-economy/article/2045061/trumps-protectionism-threatens-unravel-decades-trade>, accessed on 12 January 2020.

²²⁶ Lighthizer op cit note 25 at 1.

²²⁷ Brock Williams 'Bilateral and regional trade agreements: Issues for Congress' (2018) *Congressional Research Service* at 14, available at <https://fas.org/sgp/crs/row/R45198.pdf>, accessed on 20 June 2020.

²²⁸ Lighthizer op cit note 25 at 1.

²²⁹ James Sperling & Mark Webber 'Trump's foreign policy and NATO: Exit and voice' (2019) 45(3) *Review of International Studies* at 512.

²³⁰ Lighthizer op cit note 25 at 1–10.

According to Vidigal, President Trump is also similarly dissatisfied with global governance institutions such as the WTO and particularly the dispute settlement system.²³¹ For example, in 2018, he claimed that the WTO had been great for members such as China and terrible for the US,²³² and the US was losing almost every case at the WTO.²³³ However, experts insist that the US has won approximately 90 per cent of the cases it filed against other countries in the WTO.²³⁴ At the same time, the US has also lost approximately 86 per cent of the cases which were filed against it by the other member states, particularly those relating to the use of trade remedies such as safeguards measures and antidumping duties.²³⁵ Fabry and Tate argue that the US's win-loss ratio in the WTO is almost similar to that of the other member states.²³⁶ Again in 2018, President Trump threatened to withdraw the US from the WTO 'if it does not shape up'.²³⁷ Schneider-Petsinger argues that such withdrawal cannot happen without a formal approval from the US Congress.²³⁸ In addition, during a meeting in 2019, the Trump administration had threatened to block the adoption of the WTO's biannual budget.²³⁹

The US's dissatisfaction with the WTO and the Appellate Body's judicial function pre-dates the election of President Trump in November 2016 and it will not end with it.²⁴⁰ According to Creamer, for more than 20 years successive US administrations have expressed these concerns with no response from Geneva, while the other members of the WTO appeared to have tolerated or encouraged the Appellate Body's actions.²⁴¹ However, it is essential to note that the US's blocking tactic began under the Obama administration in 2011 when it shocked the world by preventing the reappointment of Ms. Jennifer Hillman, supposedly for failing to defend US

²³¹ Vidigal op cit note 54 at 865.

²³² Chad Bown & Douglas Irwin *What Might a Trump Withdrawal from the World Trade Organization Mean for US Tariffs?* (2018) PIIE Policy Brief 18-23 at 8, available at <https://www.wita.org/wp-content/uploads/2018/11/pb18-23.pdf>, accessed on 20 March 2020.

²³³ BBC 'Trump threatens to pull US out of World Trade Organization', available at <https://www.bbc.com/news/world-us-canada-45364150>, accessed on 12 February 2020.

²³⁴ Fabry & Tate op cit note 134 at 6.

²³⁵ Stuart Anderson 'New proposal seeks to save World Trade Organization' 2019, available at <https://www.forbes.com/sites/stuartanderson/2019/12/09/new-proposal-seeks-to-save-world-trade-organization/#575dec3461db>, accessed on 9 September 2020.

²³⁶ Fabry & Tate op cit note 134 at 6.

²³⁷ John Micklethwait, Margaret Talev & Jennifer Jacobs 'Trump threatens to pull U.S. out of WTO if it doesn't 'shape up'', available at <https://www.bloomberg.com/news/articles/2018-08-30/trump-says-he-will-pull-u-s-out-of-wto-if-they-don-t-shape-up>, accessed on 15 January 2019.

²³⁸ Marianne Schneider-Petsinger 'Reforming the World Trade Organization: Prospects for transatlantic cooperation and the global trade system' (2020) Chatham House, at 9–10, available at <https://www.chathamhouse.org/2020/09/reforming-world-trade-organization>, accessed on 2 September 2020.

²³⁹ Ibid.

²⁴⁰ Padideh Ala'I 'The vital role of the WTO Appellate Body in the promotion of rule of law and international cooperation: A case study' (2019) *The Yale Journal of International Law Online* at 87.

²⁴¹ Creamer op cit note 1 at 52.

interests in trade remedies disputes.²⁴² This blocking was apparently repeated in 2016, by the Obama administration when it refused to give consent to the reappointment of Mr. Seung Wha Chang, supposedly for failing to function within the agreed mandates contained in the DSU.²⁴³ Following the inauguration of President Trump in January 2017, the US's concerns about the Appellate Body's judicial activism were elevated to new heights.²⁴⁴ Vidigal argues that the Trump administration decided to veto all the selection processes initiated in the WTO to fill the vacant positions in the Appellate Body.²⁴⁵ At the time the Appellate Body had all seven members, but the terms of Mr. Ricardo Ramírez Hernández and Mr. Peter van den Bossche ended in 2017,²⁴⁶ while Mr. Hyun Chong Kim decided to resign from his position with immediate effect in August that year.²⁴⁷ Fabry and Tate argued that at the end of 2018, the Appellate Body was left with three members and these were Mr. Shree Baboo Chekitan Servansing, Mr. Ujal Singh Bhatia and Mr. Thomas R. Graham.²⁴⁸ However, by 10 December 2019, the Appellate Body was left with one serving member, Ms. Hong Zhao whose term is also expiring on 20 November 2020.²⁴⁹

3.2 An overview of the US's concerns with the Appellate Body's functions

The following subsections will discuss the key concerns that have been raised by the US against the Appellate Body and they have been categorised into procedural and substantive issues.

3.2.1 The procedural issues

The procedural issues relate to the Appellate Body's failure to respect the procedures governing the appellate process and they encompass the (a) the breach of the strict timeline for completing appeals; and (b) continued service by former Appellate Body members.²⁵⁰

(a) Breach of the strict timeline for completing appeals

Article 17.5 of the DSU provides that appeals must be completed within 60 days of their commencement but not later than 90 days in exceptional circumstances. If the deadline cannot

²⁴² Bahri op cit note 21 at 294.

²⁴³ Ibid at 294.

²⁴⁴ McDougall op cit note 28 at 1.

²⁴⁵ Vidigal op cit note 54 at 863.

²⁴⁶ Fabry & Tate, op cit note 134 at 7.

²⁴⁷ Tetyana Payosova, Gary Clyde Hufbauer, & Jeffrey J. Schott 'The dispute settlement crisis in the World Trade Organization: Causes and cures' (2018) PB19-19 *Peterson Institute for International Economics* at 3.

²⁴⁸ Fabry & Tate op cit note 134 at 6-7.

²⁴⁹ Ismail op cit note 62 at 62.

²⁵⁰ Lighthizer op cit note 23 at 26-37.

be met, the DSU requires the Appellate Body to consult the parties before the deadline is extended and to inform the DSB in writing of the reasons for the delay as well as the estimated date it intends to submit the report.²⁵¹ The US has since 2011 criticised the Appellate Body for issuing its reports beyond the strict timeline under art 17.5 of the DSU.²⁵² It has also claimed that the Appellate Body no longer sought approval from the parties concerned before the deadline was extended,²⁵³ or provided the DSB with an estimate of the period within which it was likely to submit its report.²⁵⁴ The US claimed that the Appellate Body's inability to comply with art 17.5 of the DSU was caused by its decision to issue unnecessary advisory opinions.²⁵⁵

(b) Continued service by former Appellate Body members

Article 17.2 of the DSU provides that persons to serve on the Appellate Body shall be appointed by the DSB for a four-year term, and each person may be reappointed only once. In accordance with art 17.9 of the DSU, the Appellate Body adopted Rule 15 of the Working Procedures for Appellate Review (also known as the transitioning rule) which authorises an Appellate Body member whose term had expired to continue to examine a case which they had been assigned during their term until its completion. The US has however, criticised the Appellate Body for permitting several individuals to continue to work on and decide appeals after the expiry of their tenures.²⁵⁶ It argued that outgoing Appellate Body members should not be allowed to work on pending appeals after their term expired,²⁵⁷ because it was violating the DSB's exclusive authority to reappoint members to serve a second term.²⁵⁸ In addition, the US has argued that the application of Rule 15 of the Working Procedures for Appellate Review was an amendment of the DSU and that it was not promulgated or approved by WTO members.²⁵⁹

3.2.2 The substantive issues

The substantive issues relate to the interpretation of WTO rules as contained in the covered agreements and they encompass the (a) review of facts and the municipal law of member states;

²⁵¹ DSU art 17.5.

²⁵² Lighthizer op cit note 23 at 28.

²⁵³ Yang Guohua 'The causes of the crisis confronting the WTO Appellate Body' (2019) 9(4) *Journal of WTO and China* at 106.

²⁵⁴ Lighthizer op cit note 23 at 31.

²⁵⁵ Ibid at 32.

²⁵⁶ Payosova, Hufbauer & Schott op cit note 247 at 4.

²⁵⁷ Philippe De Baere 'World Trade Organization' in Folkert Graafsma & Joris Cornelis (eds) *The International Trade Law Review* 3rd ed (2017) Law Business Research Ltd, London 1–20 at 14.

²⁵⁸ Statements by the United States at the Meeting of the WTO Dispute Settlement Body Geneva, November 22, 2017 at 13.

²⁵⁹ Lighthizer op cit note 23 at 33.

(b) issuing advisory opinions; (c) treatment of Appellate Body reports as binding precedent; and (d) issuing erroneous interpretations of the covered agreements.²⁶⁰

(a) Review of facts and the municipal law of member states

Article 17.6 of the DSU provides that the review scope of appeals is ‘limited to the legal aspects covered in the panel reports and the legal interpretation that was developed by the panel’. The US has criticised the Appellate Body of expanding its review scope by interfering with the panel’s fact finding authority.²⁶¹ It argued that in terms of art to art 11 of the DSU, panels are the only adjudicative body in the WTO dispute settlement system that have the authority to review the factual issues. The US also added that the Appellate Body had created several legal standards which demonstrates when a review of factual findings might succeed.²⁶² However, none of the provisions in the DSU have granted the Appellate Body with the authority to review the factual findings of panels.²⁶³

Similarly, the US has criticised the Appellate Body for asserting that it has the authority to review the municipal law of member states.²⁶⁴ However, municipal law in the WTO is regarded as an issue of fact which expresses the will of the members.²⁶⁵ The US has also argued that the Appellate Body failed to stipulate how its decision to review the municipal law of the member states was consistent with the review limit imposed by the DSU.²⁶⁶ As a result of the Appellate Body’s flawed approach, the US claimed that the division between factual and legal issues which were drawn at the end of the Uruguay Round had been eliminated.²⁶⁷ In addition, it departed from the division of responsibilities that are contained in the DSU where panels must assess or review the facts while the Appellate Body conducts a legal review of panel reports.²⁶⁸

(b) Issuing advisory opinions

²⁶⁰ Ibid.

²⁶¹ WTO Minutes of the DSB meeting of 27 August 2018 (WT/DSB/M/417), paras. 4.2.

²⁶² Ibid paras. 4.3.

²⁶³ Ibid paras. 4.4.

²⁶⁴ Lighthizer op cit note 23 at 40.

²⁶⁵ Op cit note 261, paras. 4.8.

²⁶⁶ Ibid op paras. 4.11.

²⁶⁷ Ibid paras. 4.16.

²⁶⁸ Ibid, paras. 4.16.

Article 3.2 of the DSU provides that the purpose of the dispute settlement system is to assist the members of the WTO to resolve their trade disputes. The US has criticised the Appellate Body of issuing advisory opinions on issues that were not necessary to resolve the dispute.²⁶⁹ The term ‘advisory opinions’ refers to ‘a non-binding statement on a point of law given by [an adjudicator] before a case is tried or with respect to a hypothetical situation’.²⁷⁰ Kwa and Kwa also added that advisory opinions are a regular feature in the jurisprudence of common law countries.²⁷¹ The US has argued that there are no provisions in the DSU that authorises the Appellate Body to issue advisory opinions.²⁷² In fact, the issuing of advisory opinions was perceived as an attempt by the Appellate Body to make law rather than to resolve the dispute.²⁷³ The Appellate Body was created to correct erroneous legal issues contained in panel reports and not to invent new rights and obligations of WTO members.²⁷⁴ In addition, the US has argued that advisory opinions contribute to the complexity of disputes which in turn cause delays in the appellate review proceedings.²⁷⁵ As a solution, the US proposed that when an issue that is not necessary to resolve the dispute is raised by the parties, the Appellate Body should exercise judicial economy and not rule on the issue.²⁷⁶

(c) Treatment of Appellate Body reports as binding precedent

Article IX:2 of the WTO Agreement provides that the member states have the exclusive authority to adopt binding interpretations of the covered agreements in the Ministerial Conference. The US has criticised the Appellate Body for asserting that its previous reports are entitled to be treated as binding precedent that must be followed by panels.²⁷⁷ In common law systems, the term ‘binding precedent’ means ‘that this ruling is binding for a later decision on the same legal issue, i.e., that the legal issue in the later case has to be decided in the same way than in the earlier ruling’.²⁷⁸ The US has also argued that there was no formal system of binding

²⁶⁹ Bahri op cit note 21 at 305.

²⁷⁰ WTO Minutes of the DSB meeting of 29 October 2018 (WT/DSB/M/420), para. 4.2.

²⁷¹ Danish Kwa & Aileen Kwa ‘Lights go out at the WTO’s Appellate Body despite concessions offered to US’ (2019) 70 *South Centre Policy Brief* at 4.

²⁷² US Statements by the United States at the Meeting of the WTO Dispute Settlement Body Geneva, October 29, 2018 at 9, available at https://geneva.usmission.gov/wp-content/uploads/sites/290/Oct29.DSB_Stmt_as-delivered.fin_rev_public.pdf, accessed on 3 May 2020.

²⁷³ Ibid at 10.

²⁷⁴ Payosova, Hufbauer & Schott op cit note 247 at 4.

²⁷⁵ WTO Minutes of the DSB meeting op cit note 270 para. 4.2.

²⁷⁶ Lighthizer op cit note 23 at 31.

²⁷⁷ Ibid at 28.

²⁷⁸ Lehne op cit note 3 at 79–80.

precedent in the WTO,²⁷⁹ and none of the covered agreements grants the Appellate Body reports a precedential value.²⁸⁰

(d) Issuing erroneous interpretations of the covered agreements

Article 3.2 of the DSU provides that the recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements. The US has criticised the Appellate Body of exceeding its limited authority by adopting erroneous interpretations of the WTO Agreements,²⁸¹ particularly in trade remedies disputes involving controversial issues such as subsidies, antidumping duties and countervailing measures, safeguards measures and standards.²⁸² The US has argued that through this erroneous interpretation, the Appellate Body had limited the ability of WTO members to use the trade defense mechanisms to protect their interests against non-market economies such as China.²⁸³

First, the US has raised concerns with the Appellate Body's the interpretation of the term 'public body' under the Agreement on Subsidies and Countervailing Measures (ASCM).²⁸⁴ In *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, the Appellate Body ruled that for an entity to constitute a 'public body' it must possess, exercise or be vested with governmental authority and be performing a governmental function.²⁸⁵ However, the US criticized that interpretation, arguing that it implied that anti-subsidy measures can be imposed only if the complainant had provided sufficient evidence that the entity in question was either performing governmental functions or was vested with government authority.²⁸⁶ In the US view, that restrictive interpretation of the term 'public body' automatically excluded majority of State Owned Enterprises (SOEs) that are owned and controlled by the Chinese government from the definition of subsidy in the ASCM.²⁸⁷ In addition, the US has argued that the Appellate Body's interpretation of 'public body' was not

²⁷⁹ Lighthizer op cit note 23 at 56.

²⁸⁰ Bernard Hoekman & Petros Mavroidis 'To AB or not to AB? Dispute settlement in WTO reform' (2020) *Journal of International Economic Law* at 8.

²⁸¹ Lighthizer op cit note 25 at 22.

²⁸² Ibid at 23.

²⁸³ Lighthizer op cit note 23 at 2.

²⁸⁴ Ibid.

²⁸⁵ WTO Appellate Body Report, *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, para 611.

²⁸⁶ Lighthizer op cit note 23 at 83.

²⁸⁷ Jennifer Hillman Testimony of Jennifer Hillman before the US-China Economic and Review Security Commission 2018 at 7, available at <https://www.uscc.gov/sites/default/files/Hillman%20Testimony%20US%20China%20Comm%20w%20Appendix%20A.pdf>, accessed on 4 May 2020.

based on the agreed legal texts of the WTO and was inconsistent with the ordinary meaning of the term.²⁸⁸

Second, the US has raised concerns about the Appellate Body's prohibition of the practice of zeroing when calculating the margins of dumping.²⁸⁹ In *United States – Continued Existence and Application of Zeroing Methodology*, the Appellate Body upheld the panel's findings that the use of zeroing by the US Department of Commerce (USDOC) in anti-dumping measures was inconsistent with the Anti-Dumping Agreement (ADA) and the GATT 1947 provisions.²⁹⁰ However, the US has criticised the Appellate Body's ruling arguing that the ADA does not contain clear provisions that expressly prohibit the use of zeroing in the WTO.²⁹¹ In addition, the US has argued that the Appellate Body's reasoning for prohibiting the use of zeroing has not been consistent.²⁹²

Third, the US has raised concerns with the Appellate Body's interpretations of 'unforeseen developments' under the Agreement on Safeguards.²⁹³ In *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, the Appellate Body ruled that the US's safeguard measures were inconsistent with the GATT 1994 and the Agreement on Safeguards (SG Agreement).²⁹⁴ In addition, the Appellate Body had also invented a set of conditions that must be complied with before safeguard measures can be applied.²⁹⁵ The US has criticised the Appellate Body's ruling on the grounds that it intruded on the regulatory space of the sovereign member states.²⁹⁶ It also argued that these set of conditions required for the imposition of safeguard measures that were invented by the Appellate Body were not based on the rules of the WTO.²⁹⁷

Fourth, the US has raised concerns about the Appellate Body's interpretation of the non-discrimination obligation under the Agreement on Technical Barriers to Trade (TBT

²⁸⁸ Lighthizer op cit note 23 at 9.

²⁸⁹ Ibid.

²⁹⁰ Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, para 395.

²⁹¹ Lighthizer op cit note 23 at 96 and 10.

²⁹² Ibid.

²⁹³ Ibid.

²⁹⁴ Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia* para 198.

²⁹⁵ Lighthizer op cit note 23 at 111.

²⁹⁶ Ibid.

²⁹⁷ Ibid.

Agreement).²⁹⁸ In *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, the Appellate Body found that the US ban on the sale of clove cigarettes while permitting the sale of menthol-flavoured cigarettes was discriminatory and inconsistent with the provisions of the TBT Agreement.²⁹⁹ The Appellate Body also added that the clove cigarettes (largely imported from Indonesia) and the menthol-flavoured cigarettes (mostly produced in the US) were like products and had to be treated equally.³⁰⁰ However, the US criticised the Appellate Body's ruling, arguing that it had over-reached its judicial authority by assuming the role of the regulator.³⁰¹ In addition, the US argued that the Appellate Body's approach was not based on the provisions of the TBT Agreement.³⁰²

3.3 Conclusion

This chapter has discussed the systemic concerns provided by the US for blocking the appointment of new Appellate Body members since 2017. These concerns were divided into procedural and substantive issues. The procedural issues encompassed the (a) breach of the strict timeline for completing appeals and (b) continued service by former members of the Appellate Body. Meanwhile, the substantive issues encompassed the (a) review of facts and the municipal law of member states; (b) issuing of advisory opinions; (c) treatment of Appellate Body reports as binding precedent; and (d) issuing erroneous interpretations of the covered agreements. The next chapter will critically analyse these concerns to determine whether the Appellate Body has indeed breached its limited judicial mandate.

²⁹⁸ Ibid.

²⁹⁹ WTO Appellate Body Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes* para 298.

³⁰⁰ Ibid.

³⁰¹ WTO Dispute Settlement Body 24 April 2012 minutes of meeting WT/DSB/M/315 at para 75.

³⁰² Lighthizer cit note 23 at 90.

Chapter 4: A critical analysis of the US's concerns with the Appellate Body

4. Introduction

The previous chapter has discussed the reasons behind the US's decision to block the appointment of new Appellate Body members since 2017. This chapter will provide a critical analysis of these reasons to ascertain whether the Appellate Body has indeed strayed from its limited mandate. In addition, several Appellate Body reports will be used to support the analysis. The last part of the chapter will provide concluding remarks.

4.1 An overview of the analysis

The following subsections will critically analyse the US's concerns with the Appellate Body's judicial functioning.

4.1.1 The procedural issues

(a) Breach of the strict timeline for completing appeals

This concern could be argued to have some credibility because, the Appellate Body has been reported to have concluded appeals outside the 90 days deadline since 2011.³⁰³ For example, in *United States — Measures Affecting Trade in Large Civil Aircraft — Second Complaint*, the notification to appeal was filed by the European Union (EU) on 1 April 2011 but the report was circulated to members on 12 March 2012.³⁰⁴ The US rightly asserted that the Appellate Body was also extending the 90 days deadline without consulting the parties about the delays or informing the DSB in writing of the reasons for the delay along with estimates of when it would issue the report.³⁰⁵ For example, in *United States — Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, the Appellate Body had extended the 90 days deadline without having consulted the parties.³⁰⁶ However, in *United States — Conditional Tax Incentives for Large Civil Aircraft*, the Appellate Body informed the DSB that the estimated date for the circulation of the report would be communicated to the relevant parties in due course.³⁰⁷

³⁰³ Lehne op cit note 3 at 42.

³⁰⁴ WTO *United States — Measures Affecting Trade in Large Civil Aircraft — Second Complaint*, available at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds353_e.htm, accessed on 20 June 2020.

³⁰⁵ Lehne op cit note 3 at 42.

³⁰⁶ *Statements by the United States at the October 5, 2011 DSB Meeting*, available at <https://geneva.usmission.gov/2011/10/06/dsb-meeting-3/>, accessed on 4 July 2020.

³⁰⁷ WTO *US — Tax Incentives*, available at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds487_e.htm, accessed on 20 June 2020.

Ehlermann argues, however, that the Appellate Body has found it difficult to adhere to art 17.5 of the DSU over the past few years because of legitimate factors that were beyond its control.³⁰⁸ These factors includes the increase in the number and size of appeals; the number of issues raised on appeal, including claims under art 11 of the DSU; the number of participants in appeals; the length of written and oral submissions.³⁰⁹ Condon also adds that most Appellate Body reports are written in English and then later translated into French and Spanish, the WTO's two other official languages before they are circulated to the members.³¹⁰ In order to meet the stipulated deadline, it means that the final draft of the Appellate Body report must be sent to the translators at least three weeks before the circulation date to allocate adequate time for revisions of the translators and printing processes.³¹¹ In addition, the reduction in the number of Appellate Body members over the past few years may have also hindered their ability to complete appeals timeously.

(b) Continued service by former Appellate Body members

This concern could be argued to have some credibility because certain Appellate Body members have continued to serve on appeals after their four-year terms had expired.³¹² For example, Mr. Hyun Chong Kim resigned with immediate effect from the Appellate Body on 1 August 2017 to become South Korea's Trade Minister,³¹³ but he was one of the three members that served on the appeal *EU – Antidumping Measures on Imports of Certain Fatty Alcohols from Indonesia*.³¹⁴ Similarly, Mr. Ricardo Ramírez-Hernández's second term in the Appellate Body expired on 30 June 2017,³¹⁵ but he continued to serve on the appeal *EU – Antidumping Measures on Imports of Certain Fatty Alcohols from Indonesia*.³¹⁶ The US had rightly contended that Rule 15 of the Working Procedures for Appellate Review was meant to apply

³⁰⁸ Claus-Dieter Ehlermann 'The workload of the WTO Appellate Body: Problems and remedies' 2017 (20) *Journal of International Economic Law* at 710.

³⁰⁹ Ibid.

³¹⁰ Bradly Condon 'The concordance of multilingual legal texts at the WTO' (2012) 33(6) *Journal of Multilingual and Multicultural Development* at 527.

³¹¹ WTO Communication from the Appellate Body 2013 WT/AB/20 at 40, available at https://www.tralac.org/images/News/Documents/Appellate_Body_2013_Workload_Paper.pdf, accessed on 2 May 2020.

³¹² Joost Pauwelyn 'WTO dispute settlement post 2019: What to expect?' (2019) 22 *Journal of International Economic Law* at 300.

³¹³ WTO 'Appellate Body member Hyun Chong Kim resigns', available at https://www.wto.org/english/news_e/news17_e/ab_01aug17_e.htm, accessed on 2 May 2020.

³¹⁴ WTO *European Union—Anti-Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia*, WT/DS442/AB/R, adopted Sep. 29, 2017.

³¹⁵ Lehne op cit note 3 at 13.

³¹⁶ WTO Minutes of the DSB meeting of 31 August 2017 (WT/DSB/M/400), paras. 5.3–5.5.

to relatively short periods of transition.³¹⁷ However, since 2017 the rule had been invoked in several disputes, particularly for longer periods and sometimes it was applied a few days before a member of the Appellate Body's term expired.³¹⁸ For example, Mr. Ricardo Ramírez-Hernández continued to decide appeals a couple of months after his term had expired.³¹⁹ However, with regards to the US's argument that Rule 15 of the Working Procedures for Appellate Review was neither drafted nor approved by the member states was incorrect.³²⁰ In fact, Payosova, Hufbauer and Schott argued that the chairman of the DSB and the WTO Director-General were consulted by the Appellate Body at the time when the Working Procedures for Appellate Review were drafted and later adopted.³²¹

Bahri argues that Rule 15 of the Working Procedures for Appellate Review was created to prevent any unnecessary delays or interruptions in the appellate proceedings between the period when a serving member's term ends and the date when a new member is appointed.³²² For example, it normally takes up to three months to appoint a new member of the Appellate Body.³²³ Bahri also adds that without the application of Rule 15 of the Working Procedures for Appellate Review, the appellate process would have been time consuming. Thus, permitting an individual who had just ceased to be an Appellate Body member to continue working on a pending case rather than appointing someone entirely new who would require adequate time to familiarise themselves with the case seemed rational.³²⁴ In addition, transitioning rules like Rule 15 of the Working Procedures for Appellate Review were applied by other international adjudicative bodies such as the International Court of Justice (ICJ) and the International Tribunal for the Law of the Sea (ITLOS).³²⁵

4.1.2 The substantive issues

(a) Review of facts and the municipal law of member states

³¹⁷ Lighthizer op cit note 23 at 35.

³¹⁸ Ibid.

³¹⁹ U.S. Statements at the November 22, 2017, DSB Meeting at 13, available at https://geneva.usmission.gov/wp-content/uploads/sites/290/Nov22.DSB_.pdf, accessed on 4 May 2020.

³²⁰ Jens Lehne op cit note 3 at 33.

³²¹ Payosova, Hufbauer & Schott op cit note 247 at 3.

³²² Bahri op cit note 21 at 296.

³²³ Laura von Daniels, Susanne Dröge & Alexandra Bögner 'Ways out of the WTO's December crisis: How to prevent the open global trade order from unravelling' (2019) 46 *SWP Comment* at 5.

³²⁴ Bahri, op cit note 21 at 296.

³²⁵ Payosova, Hufbauer & Schott op cit note 247 at 4.

This concern could be argued to have some credibility because the Appellate Body has been reported to have been interfering with the panel's assessment of the facts in several cases.³²⁶ For example, in *EC – Measures Concerning Meat and Meat Products (Hormones)*, the Appellate Body said that 'for an Article 11 appeal to succeed, the complaining party needed to demonstrate that the panel had committed egregious error that calls into question the good faith of the panel'.³²⁷ Similarly, in *European Communities and Certain member States – Measures Affecting Trade in Large Civil Aircraft* case, the Appellate Body ruled that 'for a claim under Article 11 to succeed, we must be satisfied that the panel has exceeded its authority as the trier of facts'.³²⁸

There is also notable evidence suggesting that the Appellate Body has also been reviewing panel findings on the meaning of municipal law of member states.³²⁹ For example, in *United States – Countervailing and Anti-dumping Measures on Certain Products from China*, the Appellate Body reviewed the US's countervailing duty law as a legal issue.³³⁰ Similarly, in the *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products* case, the Appellate Body examined India's municipal law as a legal issue.³³¹ However, it is well known in the WTO that the meaning of municipal law is an issue of fact and not subject for review.³³²

In practice, it is often difficult to distinguish issues of law from issues of fact especially since the DSU or the Appellate Body's Working Procedures for Appellate Review does not provide clear definitions.³³³ As a result, the Appellate Body has been approaching this issue on a case-by-case basis.³³⁴ In addition, Bercero argues that the significant increase of factual complexity of disputes may have also caused the Appellate Body to intrude on the authority of panels.³³⁵

³²⁶ WTO Minutes of the DSB meeting of 27 August 2018 (WT/DSB/M/417), paras. 4.1 – 4.17.

³²⁷ WTO Appellate Body Report, *EC – Measures Concerning Meat and Meat Products (Hormones)*, para. 133.

³²⁸ WTO Appellate Body Report, *European Communities and Certain member States – Measures Affecting Trade in Large Civil Aircraft* para. 881.

³²⁹ Lighthizer op cit note 23 at 40.

³³⁰ WTO Appellate Body Report, *United States – Countervailing and Anti-dumping Measures on Certain Products from China*.

³³¹ WTO Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, para. 68.

³³² US Statements by the United States at the meeting of the WTO dispute settlement body Geneva, August 27, 2018, at 15.

³³³ UNCTAD *Dispute settlement* 2003 United Nations at 10, available at https://unctad.org/en/Docs/edmmisc232add17_en.pdf, accessed on 20 July 2020.

³³⁴ Tania Voon & Alan Yanovich 'The facts aside: The limitation of WTO appeals to issues of law' (2006) 40(2) *Journal of World Trade* at 244.

³³⁵ Ignacio Garcia Bercero 'What do we need a World Trade Organization for? The crisis of the rule-based trading system and WTO reform' (2020) *Bertelsmann Stiftung* at 33.

(b) Issuing advisory opinions

This concern could not be argued to have some credibility because for starters, the Appellate Body has never explicitly claimed that it has the authority to issue advisory opinions.³³⁶ However, in terms of the DSU provisions, the Appellate Body is required to analyse each of the legal issues that the parties have raised in the appeal.³³⁷ This provision also indicates that the Appellate Body does not have the choice to exercise judicial economy and refuse to rule on any issue raised by a party even if it is considered unnecessary to resolve the dispute.³³⁸ However, Raina argues that it is essential to note that the DSU does not contain clear provisions prohibiting the Appellate Body from analysing issues that were not raised by the parties.³³⁹

(c) Treatment of Appellate Body reports as binding precedent

This concern could be argued to have some credibility because several cases, particularly on the issue of zeroing, have been considered as precedent with persuasive effect by panels.³⁴⁰ For example, in *United States — Measures Relating to Zeroing and Sunset Reviews*, the Appellate Body had referred to its earlier report in *United States — Final Dumping Determination on Softwood Lumber from Canada* to justify its ruling that the use of zeroing was inconsistent with the Anti-Dumping Agreement (ADA).³⁴¹ Similarly in *United States — Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing)*, the panel held that the issues that were raised by the US had already been addressed by the Appellate Body in *United States — Final Dumping Determination on Softwood Lumber from Canada* and departing from it would have been deemed inappropriate.³⁴² Similarly, in *United States — Continued Existence and Application of Zeroing Methodology*, the Appellate Body had suggested that panels should follow the interpretations adopted in its previous reports on the same legal issues unless there were factors to justify its deviation.³⁴³ However, in as much as there is no formal system of

³³⁶ Lehne op cit note 3 at 56.

³³⁷ WTO DSU art 17.6 and 17.12.

³³⁸ Lehne op cit note 3 at 57.

³³⁹ Akhil Raina ‘Meditations in an emergency: The Appellate Body deadlock: What it is, why it is a problem, and what to do about it’ (2018) 13 *Global Trade and Customs Journal* 376-386, available at <https://lirias.kuleuven.be/2784590?limo=0>, accessed on 15 June 2020 accessed on 15 June 2020.

³⁴⁰ Hoekman & Mavroidis op cite note 280 at 9.

³⁴¹ WTO Appellate Body Report, *United States — Measures Relating to Zeroing and Sunset Reviews*, para 121.

³⁴² WTO Panel Report, *United States — Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing)* para 7.31.

³⁴³ WTO Appellate Body Report, *United States — Continued Existence and Application of Zeroing Methodology*, para. 362.

binding precedent in the WTO, previous Appellate Body reports often do assist in the clarification of the covered agreements.

(d) Issuing erroneous interpretations of the covered agreements

It is arguably difficult to ascertain the validity of this concern because each member state brings its own understanding of what the provisions of the covered agreements mean. However, Turkey asserts that the Appellate Body's alleged judicial overreach in its reports could have been caused by factors which are not its fault.³⁴⁴ First, the WTO is responsible for overseeing several trade agreements that contains highly technical provisions such as anti-dumping, subsidies, countervailing measures and safeguards.³⁴⁵ In addition, some of the covered agreements contain vague provisions, with unclear definitions and contradictory elements.³⁴⁶ For example, the test for determining if a product has been dumped under art 2 of the ADA is excessively lengthy.³⁴⁷ As a result, the Appellate Body finds itself in a difficult position where it must interpret and clarify old provisions in modern disputes while at the same time try to ensure that the rights and obligations of member states are neither added nor diminished.³⁴⁸ Second, art 16 and art 17 of the DSU are the only two provisions that regulate the appellate proceedings in the WTO dispute settlement system.³⁴⁹ However, these provisions do not contain clear rules and standards of review, thus the Appellate Body inadvertently trespasses into the law-making function that is exclusively reserved for the member states.³⁵⁰ Third, the DSU contains multiple objectives that offer competing visions of the WTO dispute settlement system and the mandates of the adjudicative bodies especially the Appellate Body.³⁵¹ For example, art 3 of the DSU states that the WTO dispute settlement system seeks to provide 'security and predictability to the multilateral trading system'. At the same time, the Appellate Body is expected by the DSU to fulfil its functions without 'adding to or diminishing the rights and obligations' of WTO members.³⁵²

³⁴⁴ Turkey op cit note 2 at 30.

³⁴⁵ Turkey op cit note 20.

³⁴⁶ Turkey op cit note 2 at 30.

³⁴⁷ Turkey op cit note 20.

³⁴⁸ Turkey op cit note 2 at 30.

³⁴⁹ Ibid.

³⁵⁰ Ibid.

³⁵¹ McDougall op cit note 28 at 6.

³⁵² Ibid at 6.

4.2 Conclusion

This chapter has critically analysed the concerns raised by the US for blocking the appointment of new Appellate Body members. It also demonstrated that most of these concerns were not unfounded especially those relating to the procedural aspects. For example, some appeals were completed beyond 90 days strict deadline; former Appellate Body members have decided pending appeals; appeals have re-examined the facts of panels and the municipal law of member states; and Appellate Body reports have been used as binding precedent. However, the US's concerns over the issuing of advisory opinions and the erroneous interpretations of the covered agreements were difficult to analyse because every member state bring their own understanding of what the provisions mean. The following chapter will summarise the previous chapters and provide recommendations to overcome the crisis in the Appellate Body while a permanent solution is sought by the member states.

Chapter 5: Conclusion and recommendations

5. Introduction

The focus of this research has been on the WTO dispute settlement system and the crisis in the Appellate Body. It sought to examine the merits of the long-standing concerns that the US had raised about the Appellate Body's judicial function. This chapter will summarise the findings of the previous chapters and propose recommendations on how the Appellate Body crisis may be bypassed and ensure that appeals are resolved while a permanent solution is sought by the members states

5.1 Summary of the chapters

Chapter 1 introduced the research and provided a background to the appointment deadlock in the Appellate Body as well as the existing gaps in literature. It argued that while numerous scholars have criticised the US's decision to block new appointments to the Appellate Body they have, however, rarely analysed the validity of the concerns raised. The chapter also highlighted the implications that the Appellate Body crisis might have on the WTO dispute settlement system. Chapter 2 discussed the historical trajectory of the WTO dispute settlement system. It argued that the system had been in place for more than two decades and builds on the system that existed under the GATT 1947. The chapter also discussed some of the key institutional changes that were created at the end of the Uruguay Round negotiations in 1994, particularly the Appellate Body. In addition, the chapter also looked at the discussions to review the WTO dispute settlement system which had been on the agenda since the early 1990s but were never concluded. Chapter 3 discussed the US's concerns with the Appellate Body's judicial conduct and demonstrated how as well as why they were elevated to new heights following the election of President Trump in November 2016. In addition, these concerns were divided into procedural and substantive issues. Chapter 4 analysed these concerns and found that majority of them were not unfounded. In fact, they are widely shared by the other members of the WTO. For example, appeals are often completed beyond 90 days strict deadline; former Appellate Body members have decided pending appeals; appeals have re-examined the facts of panels and the municipal law of member states; and previous Appellate Body reports have been used as binding precedent. However, the concerns relating to the issuing of advisory opinions and the erroneous interpretations of the covered agreements were difficult to analyse because every member state bring its own understanding of what the provisions mean.

5.2 Recommendations

This section considers the various recommendations that have been suggested by academic writers and WTO members to bypass the crisis in the Appellate Body. They range between simpler options such as using alternative dispute settlement mechanisms already provided for in the DSU to vigorous options such as amending the DSU to remove the member's rights to file appeals.

5.2.1 Removing the appellate review stage from the WTO system

Chance has recommended that the Appellate Body should amend its Working Procedures for Appellate Review under art 17.9 of the DSU and remove the appellate review process from the WTO dispute settlement system.³⁵³ This means that if an appeal is filed and the composition of the Appellate Body is below the minimum number of members required to hear and decide an appeal, then that appeal would be considered as automatically 'completed' and circulated to the DSB for adoption.³⁵⁴ Fabry and Tate argues that the rules for amending the Appellate Body's Working Procedures for Appellate Review are quite flexible because they do not require consensus from the DSB.³⁵⁵ There are concerns, however, that this option will deprive the member states the right to appeal panel reports as provided for under art 17 of the DSU.³⁵⁶ At the same time, it is difficult to imagine how the Appellate Body would support this option, especially since it is currently being criticised by the US of engaging in judicial activism.³⁵⁷ In addition, Rule 3.1 of the Working Procedures for Appellate Review requires the decisions of the Appellate Body to be taken as a whole, however, its composition is currently left with one serving member Ms. Hong Zhao, whose term ends on 30 November 2020.³⁵⁸

5.2.2 Disputing parties may sign a 'no appeal agreement'

Pauwelyn has suggested that the member states could agree in advance to waive their right to appeal panel reports by signing a 'no appeal agreement' in respect of each dispute filed.³⁵⁹ For example, Indonesia and Vietnam signed a similar agreement in 2019, that they would not

³⁵³ Chance op cit note 45 at 6.

³⁵⁴ Pauwelyn op cit note 312 at 302.

³⁵⁵ Fabry & Tate op cit note 134 at 12–13.

³⁵⁶ Deepak op cit note 22 at 991.

³⁵⁷ Pauwelyn op cit note 312 at 303.

³⁵⁸ Baker McKenzie *Deadlock at the WTO Appellate Body: No Consensual Way out in Sight*, available at <https://www.bakermckenzie.com/en/insight/publications/2019/12/deadlock-at-wto-appellate-body>, accessed on 15 January 2020.

³⁵⁹ Deepak op cit note 22 at 992.

appeal the panel report issued in the *Indonesia — Safeguard on Certain Iron or Steel Products* case, if the Appellate Body had less than the minimum number of members required to hear and decide the appeal.³⁶⁰ Scholars such as Deepak argue that this option will assist in reducing the financial costs of litigation and will ensure that trade disputes are settled promptly.³⁶¹ However, Chance argues that majority of the WTO members would be reluctant to sign the ‘no appeal agreement’ because it would permit the automatic adoption of erroneous panel reports.³⁶²

5.2.3 Appointing new members of the Appellate Body through voting

Deepak has suggested that the member states should directly appoint new members of the Appellate Body using the majority vote procedure under art IX.1 of the Marrakesh Agreement.³⁶³ However, Hillman argues that this option would undoubtedly be the most controversial even though a voting procedure is legitimate in the rules of the WTO.³⁶⁴ She also claimed that in the past 25 years of the WTO’s existence, the member states have always adhered to the consensus-based decision-making approach that was followed under GATT 1947.³⁶⁵ However, Pauwelyn claims that this option may not be adopted, because there is little political will among the other members of the WTO to side-line the US or to set a bad precedent that may backfire against them in the future.³⁶⁶

5.2.4 Agreeing to adopt a plurilateral dispute settlement agreement without the US

Deepak has suggested that the member states could establish an arrangement that is similar to either the Appellate Body procedure or the whole dispute settlement mechanism in a separate agreement outside of the WTO framework.³⁶⁷ However, negotiating a new plurilateral agreement would be challenging particularly under the existing conditions in the WTO.³⁶⁸ According to Deepak, the rules of the WTO will require the plurilateral agreement to be approved by all the members through a consensus-based decision-making approach.³⁶⁹ In addition, any dispute settlement mechanism that excludes the US may be considered defective,

³⁶⁰ Chance op cit note 45 at 6.

³⁶¹ Deepak op cit note 22 at 992.

³⁶² Chance op cit note 45 at 6.

³⁶³ Deepak op cit note 22 at 992.

³⁶⁴ Hillman op cit note 55 at 12.

³⁶⁵ Ibid.

³⁶⁶ Pauwelyn op cit note 312 at 302–303.

³⁶⁷ Deepak op cit note 22 at 993.

³⁶⁸ Ibid.

³⁶⁹ Ibid.

particularly when considering the country's economic position in global trade or perhaps the number of trade disputes that are usually filed against it at the WTO.³⁷⁰ However, if the US were to choose to opt out of the plurilateral agreement, Deepak argues that the other member states may not find it worthwhile to proceed and sign it.³⁷¹

5.2.5 Resorting to alternative dispute settlement mechanisms available in the DSU

Article 5 of the DSU provides for other methods of resolving disputes and they include good offices, conciliation, and mediation. The benefits of using this option is that it is purely voluntary, can be initiated or terminated by any party at any time and it guarantees confidentiality.³⁷² In addition, the DSU provides that 'The Director-General may, acting in an ex officio capacity, offer good offices, conciliation or mediation with the view to assisting Members to settle a dispute'.³⁷³ However, third parties do not have the right to participate in the process unless the parties concerned grants them the permission to do so.³⁷⁴

5.2.6 Resolving appeals by using the arbitration process in the DSU

Some writers have suggested that the member states could use the arbitration proceedings under art 25 of the DSU as a temporary alternative appeal mechanism.³⁷⁵ Hillman argues that arbitration is the only option available to WTO members that does not require the rules in the DSU to be amended or a consensus decision by the DSB.³⁷⁶ This option has gained the most traction among the member states as an alternative and temporary plan to ensure that the appellate process continues to function despite the collapse of the Appellate Body in December 2019.³⁷⁷ For example, the EU and 15 other members of the WTO agreed to sign a Multi-Party Interim Appeal Arbitration Arrangement (MPIA) to replace the Appellate Body's functions at least until it has enough members to hear new appeals.³⁷⁸ These countries formally notified the WTO on 30 April 2020 that a pool of 10 arbitrators would be formed that could be selected to

³⁷⁰ Shi Jingxia & Bai Fangyan 'A practical response to the WTO Appellate Body crisis: Utilizing arbitration to resolve trade disputes' (2019) 9(2) *Journal of WTO and China* at 38.

³⁷¹ Deepak op cit note 22 at 994.

³⁷² DSU art 5.1, 5.2 and 5.3.

³⁷³ DSU art 5.6.

³⁷⁴ WTO, Dispute Settlement without Recourse to Panels and the Appellate Body, available at https://www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/c8s1p2_e.htm, accessed on 20 July 2020.

³⁷⁵ Pieter Jan Kuijper 'The US attack on the WTO Appellate' (2017) 45 (1) *Legal Issues of Economic Integration* at 15.

³⁷⁶ Hillman op cit note 55 at 8.

³⁷⁷ Deepak op cit note 22 at 995.

³⁷⁸ Terence P. Stewart *WTO Dispute Settlement in 2020: Forward Movement or Further Crisis?* (2020), available at <https://www.wita.org/blogs/wto-dispute-settlement-in-2020-forward-movement-or-further-crisis/>, accessed on 20 June 2020.

hear future appeals and that they planned to finalise the composition of this pool within three months.³⁷⁹ However, there are concerns that this option will undermine the efforts to find sustainable solutions to the US's long-standing concerns with the Appellate Body's judicial conduct.³⁸⁰ Hillman also argues that the MPIA is not a suitable option in the long term because it will only be used to resolve appeals between the member states that have signed it.³⁸¹ However, the US has not signed the MPIA and Erasmus argues that it is unlikely to do so in the future.³⁸² This will mean that appealed panel reports involving one of the world's largest trading economy and the WTO's most frequent user of the dispute settlement system will not be resolved through the MPIA.³⁸³

5.3 Conclusion

The crisis in the Appellate Body poses a serious threat to the WTO's dispute settlement function. In addition, it is essential to acknowledge that the concerns raised by the US about the Appellate Body's actions did not start with the election of President Donald Trump in 2016 and will probably not end with it. In fact, the US has publicly reiterated on numerous occasions that it will continue to block further appointments to the Appellate Body unless its concerns have been adequately addressed by the other members. However, it remains uncertain amongst the other members as to what can be done to satisfy the US, especially since it rejected all the calls to provide possible solutions. Nonetheless, an effective and sustainable solution for the Appellate Body crisis will require all the member states to bring the US to the negotiation table and engage in constructive discussions, especially since many of these concerns raised were arguably valid. However, the postponement of the 12th Ministerial Conference (MC12) originally scheduled for June 2020 due to the coronavirus pandemic has certainly diminished any prospects of resolving the crisis in the Appellate Body this year.

³⁷⁹ European Commission 'Interim Appeal Arrangement for WTO disputes becomes effective' *Press Release* 30 April 2020, available at <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2143#:~:text=The%20MPIA%20ensures%20that%20participant,independent%20and%20impartial%20appeal%20stage.,> accessed on 26 June 2020.

³⁸⁰ Gerhard Erasmus 'An interim dispute settlement arrangement for some WTO members' *tralacblog* 12 February 2020, available at <https://www.tralac.org/blog/article/14391-an-interim-dispute-settlement-arrangement-for-some-wto-members.html>, accessed on 20 June 2020.

³⁸¹ Hillman op cit note 55 at 9.

³⁸² Erasmus op cit note 380.

³⁸³ Ibid.

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